No. 02-403-CFX Title: Federal Election Commission, Petitioner
v.
Christine Beaumont, et al.

Docketed: September 13, 2002 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Aug 2 2002	Application (02A100) to extend the time to file a petition for a writ of certiorari from August 14, 2002 to September 13, 2002, submitted to The Chief Justice.
	Aug 5 2002	Application (02A100) granted by the Chief Justice extending the time to file until September 13, 2002.
	Sep 12 2002	Petition for writ of certiorari filed. (Response due October 13, 2002)
	Oct 15 2002	Brief of respondents Christine Beaumont, et al. in opposition filed.
	Oct 30 2002	DISTRIBUTED for Conference of November 15, 2002
	Nov 1 2002	Reply brief of petitioner Federal Election Commission filed.
	Nov 18 2002	Petition GRANTED. SET FOR ARGUMENT March 25, 2003. **********
	Dec 27 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including January 9, 2003.
	Jan 8 2003	Brief of petitioner Federal Election Commission filed.
	Jan 9 2003	Joint appendix filed.
	Jan 9 2003	Brief amicus curiae of Brennan Center for Justice at New York Univ. School of Law filed.
	Jan 9 2003	Brief amici curiae of Public Citizen, Inc., et al. filed.
	Jan 9 2003	Brief amicus curiae of Association of Trial Lawyers of America filed.
	Jan 30 2003	Record filed.
	Feb 3 2003	CIRCULATED.
	Feb 7 2003	Brief of respondents Christine Beaumont, et al. filed.
	Feb 10 2003	Brief amicus curiae of American Taxpayers Alliance filed.
	Feb 10 2003	Brief amicus curiae of Pacific Legal Foundation filed.
	Feb 10 2003	Brief amici curiae of RealCampaignReform.Org, Inc., et al. filed.
	Feb 25 2003	Record filed.
	Mar 10 2003	Reply brief of petitioner Federal Election Commission filed.
	Mar 25 2003	ARGUED.

Supreme Court, U.S.
FILED

02 403 SEP 12 2002

No.

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971, 2 U.S.C. 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

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In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Federal Election Commission (FEC), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

[1] The FEC did not request the Solicitor General to seek certiorari on its behalf in this case. But because this case is one "in which the United States is interested," 28 U.S.C. 518(a)—and indeed involves the constitutionality of a federal statute—the Solicitor General is responsible for conducting and controlling any litigation in this case in this Court on behalf of the FEC and, more generally, the United States. See *ibid.*; 28 C.F.R. 0.20; see also *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994).

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-40a) is reported at 278 F.3d 261. The opinion of the district court (App., *infra*, 41a-60a) is reported at 137 F. Supp. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. A petition for rehearing was denied on May 16, 2002 (App., *infra*, 61a-62a). On August 5, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 13, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law * * * abridging the freedom of speech." The Federal Election Campaign Act of 1971, provides in part: "It is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). Section 441b of the FECA is reprinted in the appendix. App., *infra*, 71a-75a.

STATEMENT

1. For nearly a century, Congress has prohibited corporations from directly contributing to campaigns and making certain expenditures in connection with federal elections.[2] The Federal Election Campaign Act

[2] In 1907, Congress prohibited any corporation from making a "money contribution" in connection with federal elections. Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864-865. Congress later extended that prohibition to "anything of value," and made it a crime for a candidate to accept corporate contributions. Federal Corrupt Practices Act of 1925, ch. 368, §§ 301, 313, 43 Stat. 1071, 1074. The prohibition was expanded to include "expenditure[s]" in 1947. Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (codified at 18 U.S.C. 610). The prohibition is currently codified in 2 U.S.C. 441b.

of 1971 (FECA) provides that it is unlawful for a corporation or labor union "to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). That prohibition was intended to combat "the problem of corruption of elected representatives through the creation of political debts," *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208 (1982) (*NRWC*) (quotation omitted), and targets corporations because they "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

At the same time, however, Congress has sought to enable individuals affiliated with corporations to participate in voluntary political activity under the sponsorship of a corporation. The FECA thus authorizes corporations to make expenditures for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation." 2 U.S.C. 441b(b)(2)(C). Such a fund is commonly known as a political action committee, or PAC. A corporation may solicit PAC funds from stockholders, certain employees, or members, and a PAC in turn may make both direct contributions and independent expenditures in connection with federal elections. 2 U.S.C. 441b(b); see *NRWC*, 459 U.S. at 200 n.4.

2. This Court has considered the operation of Section 441b of the FECA on several occasions. In *NRWC*, the Court upheld the FEC's position that a nonprofit advocacy corporation, the National Right to Work Committee (NRWC), had violated Section 441b by soliciting contributions to its PAC from individuals who were not members of NRWC. In so holding, the Court rejected the contention that its interpretation of the FECA raised a constitutional problem. See 459 U.S. at 206-209. The Court explained that Congress's interests in enacting Section 441b—in particular, its effort to address "the problem of corruption of elected representatives through the creation of political debts"—justified any burden imposed by Section 441b on the political activity at issue. *Id.* at 208; see *id.* at 208-209.

After reviewing the federal limits on corporate campaign contributions, the Court further stated that "[t]his careful legislative adjustment of the federal electoral laws * * * to account for the particular legal and economic attributes of corporations and labor organizations warrants considerable deference * * * [and] reflects a permissible assessment of the dangers posed by those entities to the electoral process." *NRWC*, 459 U.S. at 209. The Court recognized that Section 441b's prohibition on direct corporate campaign contributions applied to corporations "without great financial resources, as well as those more fortunately situated," but it concluded that deference was called for to Congress's judgment that "prophylactic measures" were necessary to protect the integrity of the electoral process from "actual and apparent corruption." *Id.* at 209-210.

In *Federal Election Commission* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), the Court held that Section 441b's prohibition on independent *expenditures* violated the First Amendment as

applied to a nonprofit advocacy corporation, Massachusetts Citizens for Life (MCFL). In so holding, the Court found that because MCFL's resources "in fact reflect popular support for [its] political positions," *id.* at 258, it did not pose the "danger of corruption" justifying the regulation of election expenditures by corporations organized for economic gain. *Id.* at 259.[3] The Court rejected the argument that *NRWC* compelled a different result, emphasizing that *NRWC* involved application of the prohibition of *contributions*, not expenditures. *Ibid.* As the Court explained, "[i]n light of the historical role of contributions in the corruption of the electoral process," "the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures." *Id.* at 260, 261-262.[4]

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[3] The Court stated that MCFL had three features "essential" to its holding: "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities," "it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings," and it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 263-264.

[4] Chief Justice Rehnquist, joined by Justices White, Blackmun, and Stevens, dissented from "the Court's decision to 'second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.'" 479 U.S. at 266 (quoting *NRWC*, 459 U.S. at 210). In their view, the "legitimate concerns arising from corporate campaign spending" that the Court recognized in *NRWC* were also sufficient to justify the regulation on political activity at issue in *MCFL*. *Id.* at 267. The nature of the corporation in *MCFL* did not alter that conclusion, since, as the dissenters pointed out, "[t]he corporation whose fund was at issue [in *NRWC*] was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance." *Id.* at 269.

3. This case involves a First Amendment challenge brought by a nonprofit advocacy corporation, respondent North Carolina Right to Life, Inc. (NCRL), and certain individuals, to 2 U.S.C. 441b, and two regulations promulgated thereunder, 11 C.F.R. 114.2 and 114.10.[5] Respondents sought a declaration that those provisions are unconstitutional both on their face and as applied to NCRL, and an injunction against their enforcement. In October 2000, the district court granted respondents' motion for summary judgment and held that Section 441b and the regulations are unconstitutional as applied to NCRL with respect to both campaign contributions and independent expenditures, but it declined to hold the provisions unconstitutional on their face. App., *infra*, 41a-60a. In January 2001, the district court permanently enjoined the FEC from enforcing violations of Section 441b and the regulations against NCRL. *Id.* at 63a-68a.

4. a. The court of appeals affirmed. App., *infra*, 1a-40a. The court held that Section 441b and the implementing regulations are unconstitutional as applied to NCRL with respect to both independent expenditures and campaign contributions, but, like the district court, rejected the argument that the provisions are unconstitutional on their face. Relying on prior circuit precedent, the court found that NCRL is in all material respects like the nonprofit advocacy corporation in *MCFL*, and held that *MCFL* and circuit precedent

[5] The first regulation (11 C.F.R. 114.2(b)) prohibits campaign contributions and expenditures in connection with federal elections by any corporation and, thus, tracks the prohibition contained in Section 441b. The second regulation (11 C.F.R. 114.10) exempts from the prohibition on independent *expenditures* corporations that share the same basic features of the corporation in *MCFL*. See App., *infra*, 3a-4a, 49a-50a.

compelled the conclusion that Section 441b's prohibition on election expenditures could not constitutionally be applied to NCRL. See *id.* at 6a n.2, 20a-21a.

The court then reached the same conclusion with respect to Section 441b's prohibition on campaign contributions by NCRL. App., *infra*, 25a. In so holding, the court rejected the FEC's argument that *NRWC* called for a different result with respect to contributions, as opposed to expenditures. *Id.* at 26a-27a. The court explained that *NRWC* "did not decide the constitutionality of the corporate ban provision as applied to MCFL-type corporations," but instead addressed only the constitutionality of the bar preventing a nonprofit corporation from using its funds to solicit non-members to contribute to its PAC. *Id.* at 27a. Moreover, the court continued, "[t]he rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions." *Id.* at 25a. Thus, under the court's decision, "the distinction between contributions and expenditures [is] immaterial in this case." *Id.* at 29a.

b. Judge Gregory concurred in part and dissented in part. App., *infra*, 35a-40a. He agreed with the court's analysis of Section 441b insofar as it concerned independent expenditures, but dissented with respect to campaign contributions. In Judge Gregory's view, the court's holding that NCRL was entitled to "an *MCFL*-type exemption for its campaign contributions * * * is inconsistent with [*NRWC*]." *Id.* at 35a. Pointing to the discussion of *NRWC* in the majority and dissenting opinions in *MCFL*, he concluded that the Court in *MCFL* had addressed the "very question" in this case, *i.e.*, the "constitutional difference between contributions and independent expenditures in the context of

§ 441b." *Id.* at 38a-39a. Moreover, Judge Gregory concluded that this Court's treatment of that question in "*NRWC* is dispositive with respect to § 441b's ban on corporate contributions." *Id.* at 40a.

Judge Gregory also pointed to the Sixth Circuit's decision in *Kentucky Right to Life, Inc.* v. *Terry*, 108 F.3d 637, cert. denied, 522 U.S. 860 (1997). As discussed below, in that case the Sixth Circuit—specifically relying on *NRWC*—upheld a state-law prohibition on campaign contributions by nonprofit advocacy corporations. Judge Gregory stated that he "would join the Sixth Circuit in upholding § 441b(a)'s ban on [campaign] contributions by non-profit ideological corporations such as NCRL." App., *infra*, 35a.

c. The Fourth Circuit denied the FEC's petition for rehearing en banc by a vote of seven to four. App., *infra*, 61a-62a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the prohibition on campaign contributions in Section 441b of the FECA is unconstitutional as applied to a nonprofit advocacy corporation such as respondent NCRL. In reaching that result, the panel below divided over the import of this Court's decision in *NRWC*, which involved application of Section 441b's prohibition on corporate campaign contributions to a nonprofit advocacy corporation similar to NCRL. The court of appeals' decision in this case conflicts with the Sixth Circuit's decision in *Kentucky Right to Life*, where the court—explicitly relying on *NRWC*—upheld a state-law prohibition on corporate campaign contributions by nonprofit advocacy corporations. The question presented is one on which uniformity is needed. Review by this Court is thus warranted.

A. Congress has long prohibited corporations from directly contributing to campaigns in connection with federal elections. See *NRWC*, 459 U.S. at 208-209; note 2, *supra*. The court of appeals' decision in this case declares that prophylactic measure—now contained in 2 U.S.C. 441b—unconstitutional as applied to nonprofit advocacy corporations such as respondent NCRL. The fact that an Act of Congress has been declared to be unconstitutional in a significant respect is itself a compelling ground for certiorari. See, *e.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 327 (1998); *FCC* v. *Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

B. The court of appeals' decision directly implicates this Court's decision in *NRWC*. As discussed above, in *NRWC* the Court agreed with the FEC that a nonprofit advocacy corporation had violated Section 441b by soliciting funds from nonmembers to be used by its PAC to make campaign contributions. 459 U.S. at 201-206. In so holding, the Court addressed Section 441b's categorical prohibition on direct corporate campaign contributions, and concluded that application of that prohibition to a nonprofit advocacy corporation such as the respondent in *NRWC* is constitutional, even though such a corporation may lack "great financial resources." *Id.* at 210; see p. 4, *supra*.

It is true that *NRWC* considered whether the nonprofit corporation at issue had violated Section 441b by soliciting PAC funds from certain persons. 459 U.S. at 198. But, as the Court recognized in *NRWC*, Section 441b's limits on PAC solicitations must be read in light of the statute's general prohibition on corporate contributions. Thus, in considering whether the solicitation limits were constitutional as applied to NRWC, the Court in *NRWC* discussed at length the broader prohibition on non-PAC contributions. *Id.* at 207-209.

Indeed, the Court stated that the question regarding solicitation of "members" was "but the tip of the statutory iceberg," which included the prohibition on direct corporate campaign contributions. *Id.* at 198 n.1. Furthermore, in deciding *NRWC*, the Court reviewed both the "statutory prohibitions," *i.e.*, the prohibition on direct corporate campaign contributions, and the "exceptions," *i.e.*, the provisions allowing such contributions through PACs. *Id.* at 208.

In subsequent decisions, this Court has read *NRWC* broadly with respect to its general treatment of Section 441b's ban on direct campaign contributions by a nonprofit advocacy corporation. For example, in *Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (*NCPAC*), the Court stated that, in *NRWC*, "we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter [the type of corporation in *NRWC*] might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit."

MCFL is also instructive. As discussed above, in *MCFL* this Court held Section 441b's prohibition on independent expenditures to be unconstitutional as applied to a nonprofit advocacy corporation. In so holding, this Court specifically distinguished *NRWC*, emphasizing that "the political activity at issue in that case was *contributions*," not expenditures. 479 U.S. at 259 (emphasis added). In distinguishing *NRWC*, the Court further recognized that it has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending," and that "the Government enjoys greater

latitude in limiting contributions than in regulating independent expenditures." *Id.* at 259-260, 261-262.

As the dissenters in *MCFL* emphasized, the corporation in *NRWC* was quite similar to the one in *MCFL*—both were "nonprofit corporation[s] without capital stock, formed to educate the public on an issue of perceived public significance." 479 U.S. at 269. As a result, it would be difficult to reconcile the analysis in *MCFL* with that in *NRWC* without the distinction that the Court explicitly drew in *MCFL* between contributions and expenditures. *Id.* at 260. That distinction, moreover, has been emphasized throughout this Court's campaign financing decisions. See, *e.g.*, *FEC* v. *Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 431 (2001) (The Court's "cases have respected th[e] line between contributing and spending"); *Nixon* v. *Shrink Mo. Gov't PAC*, 528, U.S. 377, 386, 387 (2000); *MCFL*, 479 U.S. at 259-260; *NCPAC*, 470 U.S. at 497.

The court of appeals' decision in this case invalidates the same prohibition on corporate political contributions involved in *NRWC*, as applied to a nonprofit advocacy corporation analogous to the one in *NRWC*. In addition, the court of appeals concluded that "the distinction between contributions and expenditures [is] immaterial in this case," App., *infra*, 29a, and that, instead, the rationale of *MCFL* with respect to expenditures is "equally applicable in the context of direct contributions." *Id* at 25a. As Judge Gregory explained, that analysis is difficult to square with this Court's decision in *NRWC*, as well as with the Court's discussion of *NRWC* in *MCFL*. See *id.* at 36a-40a.[6]

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[6] The court of appeals stated that Section 441b constitutes "a complete ban on NCRL's making contributions." App., *infra*, 12a. As discussed above, Section 441b allows corporations to establish

C. The court of appeals' decision creates a conflict in the circuits over the constitutionality of laws prohibiting direct campaign contributions by nonprofit advocacy corporations. In *Kentucky Right to Life*, the Sixth Circuit upheld a state law that prohibited, *inter alia*, corporations from making direct campaign contributions and expenditures in connection with state and local elections. See 108 F.3d at 639, 640 & n.3 (discussing legislative scheme). The plaintiffs in that case argued that nonprofit advocacy corporations—such as Kentucky Right to Life, Inc.—could not constitutionally be barred from making campaign contributions in connection with such elections. *Id.* at 645. And, in doing so, they maintained "that the reasoning underlying *NRWC* does not apply to nonprofit corporations like KRL because nonprofit corporations do not have the resources to amass the political 'war chests' which spurred Congress to enact the statute at issue in *NRWC*." *Id.* at 646. The Sixth Circuit disagreed.

The Sixth Circuit explained that, despite the "broad application" of Section 441b of FECA, this Court in *NRWC* deferred to Congress's judgment that "prophylactic measures" were needed to combat the problems posed by campaign contributions, even in the case of a nonprofit corporation, such as the plaintiff in *NRWC*. See 108 F.3d at 646. Indeed, the Sixth Circuit

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PACs, which in turn may make campaign contributions. See *Austin*, 494 U.S. at 658 (Section 441b requirements for establishing a PAC "do not stifle corporate speech entirely"); *MCFL*, 479 U.S. at 259 n.12 (bar to non-PAC corporate independent expenditures "is of course distinguishable from the complete foreclosure of any opportunity for political speech"); *NRWC*, 459 U.S. at 200 n.4; see also 2 U.S.C. 441b(b)(2)(C). NCRL has previously established such a PAC. See *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 709 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000).

held that "the reasoning of *NRWC* applie[d] *directly*" to the challenge to the statute at issue in *Kentucky Right to Life*. *Ibid.* (emphasis added); see *ibid.* ("Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the * * * restrictions [in this case].").

The Sixth Circuit rejected the plaintiffs' argument that this Court's decision in *MCFL* drew "a meaningful distinction between for-profit and nonprofit corporations" for purposes of analyzing a ban on corporate contributions. 108 F.3d at 646. The court explained that, "[a]lthough the Court in *MCFL* distinguished between nonprofit and for-profit corporations with respect to independent expenditures, it reiterated the *NRWC* conclusion that a legislature may restrict direct contributions to political candidates from both for-profit and nonprofit corporations in order to limit the potential for corruption commensurate with those contributions." *Ibid.* "Consequently," the Sixth Circuit held, the "distinction between nonprofit and for-profit corporations simply does not apply to regulation of direct corporate contributions." *Ibid.*

As Judge Gregory recognized, although *Kentucky Right to Life* involved a challenge to a state prohibition on corporate campaign contributions rather than to the federal prohibition in Section 441b of the FECA, the Sixth Circuit's decision in that case is directly contrary to the Fourth Circuit's decision below. See App., *infra*, 35a. Both cases involved First Amendment challenges to laws barring nonprofit and other corporations from making direct campaign contributions. In *Kentucky Right to Life*, the Sixth Circuit looked to this Court's decision in *NRWC* and held that the First Amendment does not preclude such a prohibition. See 108 F.3d at

646. By contrast, in this case the Fourth Circuit rejected reliance on *NRWC* and held that such a prohibition is unconstitutional. App., *infra*, 26a-27a.[7]

D. The question presented is undeniably important. Congress has determined that a prophylactic rule against direct corporate contributions is necessary to prevent both "actual and apparent corruption" in federal elections. *NRWC*, 459 U.S. at 209-210. The court of appeals' decision in this case declares that prophylactic rule—in Section 441b of the FECA—to be unconstitutional as applied to nonprofit advocacy groups such as NCRL. The district court itself stated that a "great number of corporations" may fall within the exemption created by the decision below with respect to corporate contributions. App., *infra*, 66a. Moreover, by their very nature, such corporations have an obvious interest in participating in and, indeed, in influencing the outcome of federal elections. Accordingly, the decision below is likely to have an immediate impact.

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[7] Other circuits also have read this Court's decision in *NRWC* as generally affirming the constitutionality of Section 441b's ban on direct corporate contributions. In *Athens Lumber Co.* v. *FEC*, 718 F.2d 363, 363 (1983) (en banc) (per curiam), cert. denied, 465 U.S. 1092 (1984), the Eleventh Circuit rejected a constitutional challenge, *inter alia*, to Section 441b's ban on corporate contributions, explaining that the case was "controlled" by this Court's decision in *NRWC* upholding that ban. Similarly, in *Mariani* v. *United States*, 212 F.3d 761, 772 (en banc), cert. denied, 531 U.S. 1010 (2000), the Third Circuit stated that it was "constrained to read *NRWC*, and the Court's statements on *NRWC* in *Nat'l Conservative PAC*, as at least strong suggestions that § 441b(a) is constitutional" insofar as it prohibits "contributions from corporate treasuries." Although neither *Athens Lumber* nor *Mariani* involved the application of Section 441b to a nonprofit advocacy corporation, the decisions nonetheless read *NRWC* more broadly than did the Fourth Circuit in this case.

There is a clear need for uniform campaign financing rules governing federal elections across the country. Many if not most nonprofit advocacy corporations operate in several different States. Under the injunction upheld by the Fourth Circuit in this case, respondent NCRL would not be prohibited under Section 441b from contributing to a senatorial campaign in Ohio. However, in the Sixth Circuit, it would be a violation of Section 441b for that senatorial campaign to receive such a contribution. Moreover, an organization similar to NCRL but located within the Sixth Circuit would be prohibited from making an identical contribution to the same senatorial campaign. That situation creates inequality among potential corporate contributors, and potential chaos and confusion as to which campaign financing rules apply to which political contributions, and which recipients of such contributions.

In short, guidance is needed from this Court concerning whether, consistent with the First Amendment and this Court's precedents, Section 441b may be applied to a nonprofit advocacy corporation, such as NCRL, that seeks to make direct campaign contributions in connection with a federal election.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-1348, 01-1479

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLANT

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE

Argued: Oct. 31, 2001
Decided: Jan. 25, 2002

OPINION

Before: WILKINSON, Chief Judge, and WIDENER and GREGORY, Circuit Judges.

WILKINSON, Chief Judge.

Plaintiffs North Carolina Right to Life, a nonprofit advocacy corporation, its officers, and an eligible voter in North Carolina filed a challenge to 2 U.S.C. § 441b(a) of the Federal Election Campaign Act and two imple-

menting regulations. The district court held that these provisions violated the plaintiffs' First Amendment right to make expenditures and contributions in connection with federal elections. However, the court declined to facially invalidate § 441b(a) and the regulations. We conclude that these provisions burden the First Amendment speech and association interests of nonprofit advocacy groups. We further hold that the prohibition on independent expenditures is not narrowly tailored to serve a compelling governmental interest, and that the proscription on contributions is not closely drawn to match a sufficiently important interest. *Buckley* v. *Valeo*, 424 U.S. 1, 24-25, 44-45, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377, 387-88, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000). However, because the provisions at issue are constitutional in the overwhelming majority of applications, we decline to invalidate them facially and affirm the judgment of the district court.

I.

Plaintiffs North Carolina Right to Life ("NCRL"), Christine Beaumont, Loretta Thompson, Stacy Thompson and Barbara Holt are challenging 2 U.S.C. § 441b(a) of the Federal Election Campaign Act ("FECA") and two implementing regulations, 11 C.F.R. §§ 114.2(b) and 114.10. NCRL is a nonprofit corporation, exempt from federal taxation under § 501(c)(4) of the Internal Revenue Code. NCRL is a charitable organization that, *inter alia*, provides crisis pregnancy counseling, publishes crisis pregnancy literature, and promotes alternatives to abortion. NCRL has no shareholders and none of its earnings inure to the benefit of any individual. Christine Beaumont is an eligible voter in North

Carolina. Loretta Thompson is Vice President of NCRL. Stacy Thompson is a member of NCRL's Board of Directors, and Barbara Holt is President of NCRL.

Plaintiffs filed this action against the Federal Election Commission ("FEC" or "Commission") on January 3, 2000, challenging the constitutionality of FECA's prohibitions on corporate independent expenditures and contributions in connection with federal elections. Plaintiffs sought declaratory and injunctive relief, arguing that 2 U.S.C. § 441b(a) and two regulations promulgated thereunder violated their First Amendment right to make independent expenditures and contributions in connection with federal elections. Plaintiffs moved for summary judgment and the FEC moved for partial dismissal and partial summary judgment.

Section 441b(a) makes it "unlawful . . . for any corporation whatever . . . to make a contribution or expenditure in connection with any election" for federal office. And accompanying regulation 11 C.F.R. § 114.2(b) prohibits all corporate contributions to federal candidates and all expenditures made by non-qualified corporations. The exemption for qualified corporations was created in response to the Supreme Court's decision that § 441b(a)'s prohibition on independent expenditures from a corporation's general treasury was unconstitutional as applied to Massachusetts Citizens for Life ("MCFL"), a small, non-profit political advocacy corporation. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) ("*MCFL*"). The Court identified three non-profit characteristics of MCFL that were essential to its holding that the group could not constitutionally be bound by § 441b(a)'s restriction on independent spend-

ing.[1] The FEC rigidly codified these three characteristics in 11 C.F.R. § 114.10. Corporations that meet the criteria in 11 C.F.R. § 114.10 are "qualified non-profit corporation[s]" not subject to the prohibition on independent expenditures of § 441b(a) and 11 C.F.R. § 114.2(b). NCRL did not qualify for the 11 C.F.R. § 114.10 exemption and challenged the regulation for that reason.

The district court, on October 3, 2000, recognized that "the importance of campaign contributions and expenditures as political speech is beyond question," and held that NCRL had established a First Amendment right to make independent expenditures and limited contributions. *Beaumont* v. *FEC*, 137 F. Supp. 2d 648, 651, 658 (E.D. N.C. 2000). The court then determined that there were two possible remedies: (1) declare the provisions of FECA unconstitutional as applied to NCRL, or (2) declare the provisions of FECA facially unconstitutional. *Id.* at 658. Instead of determining a remedy on October 3, the court required the parties to address the scope of declaratory relief and stayed the effect of the October 3 ruling until it issued a final order. *Id.* at 658.

On January 21, 2001, the district court held that 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 were unconstitutional as applied to NCRL, and permanently enjoined the FEC from enforcing violations of those sections against NCRL. The district court declined to hold the provisions of FECA facially unconstitutional because NCRL failed to demonstrate that "the constitutional infringements caused by 2 U.S.C. § 441[b(a)] and the related regulations are 'substantial' in relation to their 'plainly legitimate sweep.'" The FEC appeals and the plaintiffs cross-appeal the district court's decision not to hold 2 U.S.C. § 441b(a) facially unconstitutional.

[1] First, MCFL was created to promote political ideas, and could not engage in business activities. Second, it had no shareholders or other persons with a claim on its assets or earnings. And third, it was not established by a business corporation or labor union, and had a policy of refusing contributions from such entities. *MCFL*, 479 U.S. at 263-64, 107 S. Ct. 616.

II.

A.

We review *de novo* the district court's grant of the plaintiffs' motion for summary judgment. *See Smith* v. *Va. Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1996) (en banc). In so reviewing the judgment, we must determine whether the prohibitions of § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 burden the exercise of political speech. If they do, we must first decide whether the proscription on independent expenditures is narrowly tailored to serve a compelling governmental interest. *Buckley*, 424 U.S. at 44-45, 96 S. Ct. 612; *see also MCFL*, 479 U.S. at 251-52, 107 S. Ct. 616. We must next consider whether the prohibition on contributions is closely drawn to match a sufficiently important interest. *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897; *Buckley*, 424 U.S. at 24-25, 96 S.Ct. 612.

B.

1.

Any discussion of the First Amendment interests at issue in this case must begin with the Supreme Court's decision in *MCFL*. The Court took pains there to emphasize the special role that nonprofit advocacy organizations play in the political process. The Court

identified several characteristics of these groups that make them special purveyors of political speech. Far from having as their organizing purpose the aggregation of capital or the issuance of equity shares, their central energizing principle is unabashedly political and expressive. These groups, whether incorporated or not, are "formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259, 107 S. Ct. 616.[2]

As a consequence, nonprofit advocacy organizations play a distinctive role in the political scheme. Like the other participants in our political conversation, they inform and generate "[d]iscussion of public issues and debate on the qualifications of candidates," which are "integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14, 96 S. Ct. 612. *See also North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000) (referring to the field of campaign politics as "an area of . . . crucial import to our representative democracy") ("*NCRL I*"). We live in a republic, where the people are sovereign. *See The Federalist No. 39*, at 190 (James Madison) (Garry Wills ed., 1982). As a consequence, "the ability of the citizenry to make informed choices among candidates for office is essential, for the

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[2] What the Court said of the nonprofit corporation at issue in *MCFL* applies with equal force to NCRL. Applying *MCFL* in *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705 (4th Cir. 1999) ("*NCRL I*"), we found that the small amount of corporate contributions NCRL received did not result in its "serving as a conduit 'for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace.' *MCFL*, 479 U.S. at 264, 107 S. Ct. 616." *NCRL I*, 168 F.3d at 714. We therefore held that "NCRL falls squarely within the *MCFL* exception." *Id.*

identities of those who are elected will inevitably shape the course that we follow as a nation." *Buckley*, 424 U.S. at 14-15, 96 S. Ct. 612. Through their expressive activities, groups such as MCFL and NCRL help empower citizens to make informed political choices. That is precisely why the Court has concluded that it is this kind of speech and these types of organizations that lend vitality to our political discourse.

That the functioning of these groups is vital to our democratic political process is abundantly clear from looking at the types of activities in which they engage. The Court in *MCFL* emphasized that MCFL had accepted voluntary donations from members; engaged in fundraising activities such as garage sales, bake sales, dances, raffles, and picnics; organized a public prayer service; sponsored a regional conference; provided speakers for discussion groups, debates, lectures, and media programs; sponsored an annual march; drafted and submitted legislation; sponsored testimony on proposed legislation; urged its members to contact their elected representatives to express their views on legislative proposals; and published a newsletter. 479 U.S. at 242, 107 S. Ct. 616. Similarly, NCRL engages in these same kinds of endeavors. The group is funded overwhelmingly by private contributions from individuals, and has organized such traditional fundraising activities as bake sales, walkathons, and raffles. In addition, NCRL publishes a newsletter, candidate surveys, and voter guides. It also holds conventions, provides counseling and referrals, and publicizes and promotes numerous service groups.

Taking stock of such activities reinforces the point that these organizations lie at the expressive heart of our political life. These endeavors are what attract

contributions and adherents. It is through projects such as these that groups become important symbols in political life and valuable participants in the daily ebb and flow of political discourse.

2.

All of the above activities embody participatory democracy. It follows ineluctably that restrictions on the expenditures and contributions of such organizations in federal election campaigns "operate in an area of the most fundamental First Amendment activities." *Buckley*, 424 U.S. at 14, 96 S. Ct. 612. The First Amendment "protect[s] our cherished right to political speech." *FEC* v. *Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997). The First Amendment also protects political association, and the regulation of contributions and expenditures implicates both of these interests. *Buckley*, 424 U.S. at 14-23, 96 S. Ct. 612. It would be foolhardy to pretend that a ban on the ability of advocacy groups to make contributions and expenditures does not impair their capacity to participate in the political process. Making expenditures and funding campaigns are essential means by which citizens in a democracy can make themselves heard.

It is revealing that, even where the Court's decisions have not addressed campaign contributions and expenditures, they have underscored the First Amendment values that may be served by them. Without the ability to expend funds, it is almost impossible for political expression in our modern society "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). *See also Mills* v. *Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966) (noting

the "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs," including "discussions of candidates"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (noting our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). Similarly, without the expenditure of funds, "[e]ffective advocacy of both public and private points of view, particularly controversial ones," will not be significantly "enhanced by group association." *NAACP* v. *Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). *See also Kusper* v. *Pontikes*, 414 U.S. 51, 56-57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973) (stating that "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments," and that "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom"). This language from non-funding decisions does not suddenly become inoperative when contributions and independent expenditures are at issue.

It is true that there exists a differentiation in the weight the First Amendment accords to contributions and expenditures, and that an interest of the highest First Amendment order attaches to independent expenditures. The Court in *Buckley* concluded that "although [FECA's] contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations

on financial contributions." 424 U.S. at 23, 96 S. Ct. 612. *See also FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 121 S. Ct. 2351, 2356, 150 L. Ed. 2d 461 (2001) ("*Colorado II*"); *Shrink Missouri*, 528 U.S. at 386-88, 120 S. Ct. 897; *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610, 614-15, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996) ("*Colorado I*"); *MCFL*, 479 U.S. at 259-60, 107 S. Ct. 616. At the same time, however, the Court has been careful in all of these cases not to expel financial contributions from the circle of First Amendment values. This is so for good reason. Individuals and groups that stand for ideas have a First Amendment interest in pursuing various outlets for those ideas. Independent expenditures are one such channel, and contributions are another.

Making a contribution to a candidate not only "serves as a general expression of support for the candidate and his views," but also "serves to affiliate a person with a candidate." *Buckley*, 424 U.S. at 21-22, 96 S. Ct. 612. In addition, making a contribution to a candidate "enables like-minded persons to pool their resources in furtherance of common political goals." *Id.* Indeed, while citizens certainly can and do participate as individuals in the process of determining political change, they often do not possess the time, information, and resources to effectively influence public debate. Contributions to an advocacy group from an individual permit the individual to take advantage of the group's closer attention to political developments. And contributions from the advocacy group to a candidate in turn put the individual's donation to a more efficient and informed political effect. As the Court noted in *MCFL*:

> [I]ndividuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.

479 U.S. at 261, 107 S. Ct. 616. By making a contribution to an advocacy group, the individual citizen authorizes and empowers the organization receiving the money to serve as his or her proxy in political debate.

In sum, nonprofit advocacy organizations such as NCRL have a strong First Amendment interest in expressing their ideas and associating with others who share the same views. These entities significantly enhance the effectiveness of political expression by facilitating political association. And these groups advance both the values of political speech and association not only by making independent expenditures, but also by making contributions to candidates who share their beliefs.

3.

With these general principles in mind, it is clear that the statutory and regulatory provisions at issue in this case burden the plaintiffs' First Amendment speech and association interests. Taken together, 2 U.S.C. § 441b(a), 11 C.F.R. § 114.2(b), and 11 C.F.R. § 114.10 ban corporate contributions and expenditures in connection with federal elections, with an exception to the prohibition on corporate expenditures for certain "qualified" nonprofit corporations so narrow that NCRL does not fit into it. In view of the Court's conclusion in *Buckley* that FECA's "contribution and

expenditure *limitations* both implicate fundamental First Amendment interests," 424 U.S. at 23, 96 S. Ct. 612 (emphasis added), there is no question that a complete ban on NCRL's making contributions and expenditures burdens those very same interests.[3]

The FEC responds that, contrary to the district court's characterization, FECA and its implementing regulations do not impose a blanket prohibition. Rather, the Commission submits that the Act takes a different approach. It allows all corporations to make campaign contributions through a separate segregated fund, and corporations that do not fall within 11 C.F.R.

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[3] The FEC argues that NCRL lacks standing to challenge 11 C.F.R. § 114.10, relying on our holding in *NCRL I* that "NCRL falls squarely within the *MCFL* exception." 168 F.3d at 714. The Commission correctly observes that *NCRL I* entitles NCRL to make independent expenditures in connection with federal elections regardless of the FEC's regulation or intentions. *See supra* note 2. Thus, the Commission submits that the mere existence of a regulation that it cannot enforce against NCRL cannot cause NCRL any injury.

We are not persuaded. The FEC has made inconsistent statements throughout this litigation, and its present position is not sufficient to dispel the "credible threat of prosecution" under which NCRL operates. *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979); *Va. Soc'y for Human Life, Inc.* v. *FEC*, 263 F.3d 379, 386 (4th Cir. 2001). Though the Commission agrees that it is bound by *NCRL I*, it has not foresworn its ultimate intention to prohibit NCRL even from making independent expenditures. On the contrary, the FEC argued below that if in the future NCRL were to receive a more substantial portion of its funding from for-profit corporations, it would not qualify for the *MCFL* exception even under the holding in *NCRL I*. Because we cannot conclude that NCRL does not presently operate under the potential threat of an enforcement action, we agree with the district court that NCRL has standing to challenge 11 C.F.R. § 114.10.

§ 114.10's exception to make independent expenditures through such a fund. *See* §§ 441b(a) and (b)(2)(C). Given the availability of this alternative avenue through which to make contributions and expenditures, the FEC maintains that it is factually incorrect to contend that an absolute ban is at issue in this case.

However, the FEC's view has already been rejected by the Supreme Court in *MCFL*. While restricting MCFL's campaign spending to use of a separate segregated fund "is not an absolute restriction on speech, it is a substantial one. Moreover, even to speak through a segregated fund, MCFL must make very significant efforts." *MCFL*, 479 U.S. at 252, 107 S. Ct. 616 (plurality opinion).[4] A segregated fund is a "political committee" under the Act. 2 U.S.C. § 431(4)(B). As a consequence, organizations that use a segregated fund must adhere to significant reporting requirements, staffing obligations, and other administrative burdens. These burdens stretch far beyond the more straightforward disclosure requirements on unincorporated associations. *See MCFL*, 479 U.S. at 252-53, 107 S. Ct.

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[4] In her concurring opinion, Justice O'Connor pointedly emphasized that "the significant burden on MCFL in this case comes . . . from the additional organizational restraints imposed upon it by the Act," as well as from the Act's "solicitation restrictions." 479 U.S. at 266, 107 S. Ct. 616 (O'Connor, J., concurring in part and concurring in the judgment). Therefore, a majority of the Court in *MCFL* rejected the argument that the FEC is presently urging upon us.

616. Asnoted in *MCFL*, 479 U.S. at 253-54, 107 S. Ct. 616, these additional burdens include:

- appointing a treasurer, § 432(a);

- forwarding contributions to the treasurer within 10 or 30 days of receiving them, depending on the amount, § 432(b)(2);

- ensuring that the treasurer keeps an account of (1) every contribution regardless of amount; (2) the name and address of anyone who makes a contribution in excess of $50; (3) all contributions received from political committees; and (4) the name and address of every person to whom a disbursement is made regardless of amount, § 432(c);

- preserving receipts for all disbursements over $200 and all records for three years, §§ 432(c) and (d);

- filing a statement of organization containing (1) its name and address; (2) the name of its custodian of records; and (3) its banks, safety deposit boxes, or other depositories, §§ 433(a) and (b);

- reporting any change in the above information within 10 days, § 433(c);

- terminating only upon filing a written statement that it will no longer receive any contributions or make any disbursements, and that it has no outstanding debts or obligations, § 433(d)(1);

- filing either (1) monthly reports with the FEC; or (2) quarterly reports during election years, a pre-election report no later than the 12th day before an

election, a post-election report within 30 days after an election, and reports every 6 months during non-election years, §§ 434(a)(4)(A) and (B);

- including in such reports information regarding (1) the amount of cash on hand; (2) the total amount of receipts in multiple categories; (3) the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, interest, or any other offset to operating expenditures in an aggregate amount above $200; (4) the total amount of all disbursements in numerous categories; (5) the names of all authorized or affiliated committees to which transfers have been made; (6) persons to whom loan repayments or refunds have been made; and (7) the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation, § 434(b); and

- soliciting contributions for its separate segregated fund only from its "members," §§ 441b(b)(4)(A) and (C), which, under *FEC v . National Right to Work Committee*, 459 U.S. 197, 203-206, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982) ("*NRWC*"), does not include persons who have merely contributed to or expressed support for the group in the past.

Many small groups may be unable to bear the substantial costs of complying with these regulations. These "more extensive requirements and more stringent restrictions . . . may create a disincentive for

such organizations to engage in political speech." *MCFL*, 479 U.S. at 254, 107 S. Ct. 616. This is because:

> Faced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to the merchandise on display, it would not be surprising if at least some groups decided that the contemplated political activity was simply not worth it.

Id. at 255, 107 S.Ct. 616. And Justice O'Connor emphasized in her concurring opinion that "the additional organizational restraints" imposed on "groups such as MCFL" by the Act amount to a "significant burden" on their First Amendment interests. 479 U.S. at 266, 107 S. Ct. 616 (O'Connor, J., concurring in part and concurring in the judgment).

Thus, what was true of MCFL is equally true of NCRL:

> [W]hile § 441b does not remove all opportunities for independent spending by organizations such as MCFL, the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize § 441b as an infringement on First Amendment activities.

MCFL, 479 U.S. at 255, 107 S. Ct. 616. The "practical effect" of § 441b(a) on NCRL "is to make engaging in protected speech a severely demanding task." *MCFL*, 479 U.S. at 256, 107 S. Ct. 616. Accordingly, we have little difficulty concluding that the prohibitions of

§ 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 burden the exercise of political speech and association.

C.

1.

Having determined that 2 U.S.C. § 441b(a) and the associated regulations burden a significant First Amendment interest in the exercise of political speech and association, we must first determine whether the prohibition on expenditures is narrowly tailored to serve a compelling governmental interest. *Buckley*, 424 U.S. at 44-45, 96 S. Ct. 612. Then we must determine whether the proscription on contributions is closely drawn to match a sufficiently important governmental interest. *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897. "The Supreme Court has regularly recognized that the prevention of real and perceived corruption in the electoral process qualifies as a compelling state interest." *Adventure Communications, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 442 (4th Cir. 1999); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985) ("*NCPAC*"); *Shrink Missouri*, 528 U.S. at 388-89, 120 S. Ct. 897. The danger of corruption or the appearance of corruption is especially keen in the context of corporate contributions and expenditures because of the unique legal and economic characteristics of the corporate form. Corporations benefit from state laws that grant them special advantages such as limited liability, favorable treatment for asset accumulation, and perpetual life. These state-created advantages allow corporations to attract capital and deploy resources in order to maximize shareholder wealth in ways that other business forms cannot.

Corporations could use that wealth to influence federal elections. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990). Consequently, the Court has identified certain types of corruption that may warrant legislative regulation of a corporation's ability to make expenditures or contributions in connection with federal elections.

The first and most obvious type of corruption identified by the Court is quid pro quo corruption, where an officeholder takes money with the explicit understanding that he will perform certain duties for the donor in return. *See generally* Thomas Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 131-33 (1997). As the Court noted in *Buckley*, "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." 424 U.S. at 26, 96 S. Ct. 612. Simply put, "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497, 105 S. Ct. 1459.

Quid pro quo corruption is related to a second form of corruption, monetary influence. Corruption through monetary influence is a more subtle and hence more pervasive form of corruption than the quid pro quo, one in which officeholders consider monetary influences when performing their public duties. Monetary influence need not involve an explicit deal between a donor and an officeholder. Burke, *supra*, at 131-33. The corrupting effect of monetary influences has been clarified in the case law as the concern over the power of corporations to utilize the special advantages of the

corporate form to create political "war chests" which could be used to incur political debts. *NRWC*, 459 U.S. at 207-08, 103 S. Ct. 552. The concern here has to do with permitting corporations to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." *MCFL*, 479 U.S. at 257, 107 S. Ct. 616. Accordingly, the Court has recognized as compelling the governmental interest in preventing corruption, which supports restricting the influence of political "war chests" funneled through the corporate form. *NRWC*, 459 U.S. at 207-08, 103 S. Ct. 552; *see also MCFL*, 479 U.S. at 257, 107 S. Ct. 616.

Third, the possibility of distortion of political support for corporate causes has been recognized as a form of corruption significant enough to warrant government regulation. Burke, *supra*, at 133-135. Distortion involves the concern that "[t]he resources in the treasury of a business corporation . . . . are not an indication of popular support for the corporation's political ideas." *MCFL*, 479 U.S. at 258, 107 S. Ct. 616. Instead, these resources may reflect only "the economically motivated decisions of investors and customers." *Id.* The fear here is that shareholders or members of certain corporations will have an "economic disincentive for disassociating with [the corporation] if they disagree with its political activity." *Id.* at 264, 107 S. Ct. 616; *see also Austin*, 494 U.S. at 663, 110 S. Ct. 1391. Accordingly, the potential for distortion is also a compelling governmental interest for limiting political expression. *MCFL*, 479 U.S. at 263-64, 107 S. Ct. 616; *Austin*, 494 U.S. at 663, 110 S. Ct. 1391.

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Nevertheless, the Supreme Court has also made it clear that the "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes." *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. This potential presents a real danger when for-profit corporations are involved. However, such a danger is not present when the corporation at issue is a nonprofit advocacy corporation.

To begin with, when independent expenditures are considered, the potential for corruption, whether it be quid pro quo, monetary influence, or distortion, is "substantially diminished." *Buckley*, 424 U.S. at 47, 96 S. Ct. 612. Hence, the Supreme Court has crafted an exception to the expenditure prohibition contained in 2 U.S.C. § 441b(a) for nonprofit advocacy corporations. This is the so-called *MCFL* exception. This court has already held that NCRL is entitled to the *MCFL* exception. *NCRL I*, 168 F.3d at 714.

In *NCRL I*, we determined that "the list of nonprofit corporate characteristics in *MCFL* was not 'a constitutional test for when a nonprofit must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*.'" 168 F.3d at 714 (quoting *Day v. Holahan*, 34 F.3d 1356, 1363 (8th Cir. 1994)). After examining the factors identified in *MCFL*, we were persuaded that NCRL was entitled to the *MCFL* exception. *Id.* When applying *MCFL*, we noted that "NCRL displays all the typical characteristics of the non-profit form—it does not engage in profit-making activity, it has no shareholders or other persons who might have [a claim] on its assets and earnings, and it is exempt from federal income taxation." *Id.* Unlike

MCFL, NCRL did not have a policy against accepting corporate donations. However, NCRL was funded overwhelmingly by private, individual donations. While NCRL had accepted some corporate donations in the past, these donations made up only between zero and eight percent of NCRL's total revenues. *Id.* We concluded that "this modest percentage of revenue" did not disqualify NCRL for the *MCFL* exemption. *Id.* In addition, many of those corporate contributions were not of the traditional form because they were "part of a program by which phone company customers may direct their phone bill refunds to a nonprofit of their choice." *Id.* Therefore, we held that "NCRL falls squarely within the *MCFL* exception." *Id.*

Because NCRL has not changed in any relevant way since our decision in *NCRL I*, NCRL does not "serv[e] as [a] conduit[ ] for the type of direct spending that creates a threat to the political marketplace." *MCFL*, 479 U.S. at 264, 107 S. Ct. 616. This constitutionally entitles NCRL to an exemption from the provisions banning independent expenditures in § 441b(a) and 11 C.F.R. § 114.2(b). And because the exception in 11 C.F.R. § 114.10 constitutes merely a rigid codification of the factors in *MCFL*, it is also unconstitutional as applied to NCRL.

3.

While the FEC recognizes that our decision in *NCRL I* controls the outcome of this case insofar as independent expenditures are concerned, it contends that we must consider contributions separately and hold the contribution portion of the statute and regulations constitutional as applied to NCRL. The Supreme Court has not addressed whether the risk of corruption from

direct contributions is present when the contributors are nonprofit advocacy corporations who neither have shareholders nor investing members, and accept the overwhelming share of their donations from private individuals. We do not believe that it is.

Viewing every direct campaign contribution from a nonprofit advocacy corporation to be corrupting would be devastating to the proper functioning of the political process. The argument that only an absolute ban on nonprofit contributions can serve the important public interest in preventing corruption simply proves too much. If this were true, contributions would also have to be banned in every situation where contributing individuals or unincorporated associations bore a strong commitment to an issue or candidate. Instead, limits, not total bans, have been adopted for individuals and unincorporated advocacy groups.

NCRL is more akin to an individual or an unincorporated advocacy group than a for-profit corporation. Neither individuals nor unincorporated advocacy groups pose so great a risk of quid pro quo or monetary influence corruption that a ban on contributions is required. Similarly, nonprofit advocacy corporations do not avail themselves of the state-conferred advantages associated with the corporate form, which is the rationale for regulating corporate activity in the first place. *See, e.g., Austin*, 494 U.S. at 658-59, 110 S. Ct. 1391. Advocacy groups rely on donations to fund a variety of projects, none of which involve making a profit in the capital markets. It is simply implausible to argue that a small nonprofit accepting individual contributions from like-minded donors poses the same risk to our political order as a Fortune 500 company.

However, the FEC argues that by virtue of taking the corporate form, NCRL now poses those risks. But *MCFL* requires a different conclusion. The Court emphasized that taking the corporate form does not, by itself, transform an otherwise benign group into one that poses an inherent risk of corruption. As noted earlier, NCRL, like MCFL, "was formed to disseminate political ideas, not to amass capital." *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. Thus, NCRL does not utilize the advantages states confer on corporations that enable them to amass capital. The advantages NCRL derives from taking on the corporate form are those "that redound to its benefit as a political organization, not as a profit-making enterprise." *Id.*

NCRL also poses no threat of distortion of political support because the very reason people join and contribute to NCRL is that their views are aligned with those of the organization. NCRL's members have no underlying economic incentive to join the group, making NCRL distinctly different from for-profit corporations and many non-profits as well. *See, e.g., Austin*, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652. There is simply no danger that a nonprofit advocacy group's cause will bear no relation to the beliefs of its contributors and members because the group's *raison d'etre* is to amplify and publicize those beliefs. Nor is there the danger that an individual donor would feel alienated because his views are diametrically opposed to those of the organization. In fact, as the Court recognized in *MCFL*, individuals contribute to political organizations "precisely because they support those purposes," and because they believe that contribution is a "more effective means of advocacy" than spending the money on their own. 479 U.S. at 260-61, 107 S. Ct. 616.

Thus, allowing NCRL to make limited contributions creates no credible threat of distortion to the political process.

To be sure, it would be administratively more convenient if all direct contributions to candidates were prohibited. After all, a bright-line rule would be easier to administer and would tend to avoid litigation. It could likewise be said, of course, that convenience would be served if all corporate independent expenditures were prohibited. But the Court in *MCFL* flatly refused to credit administrative convenience as an adequate basis for such a blanket rule, stating that "the desire for a bright-line rule . . . hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom." 479 U.S. at 263, 107 S. Ct. 616. Although administrative convenience constitutes a legitimate state interest where rational basis scrutiny of regulatory enactments is involved, such convenience is insufficient to justify state action that triggers any level of heightened scrutiny. *See, e.g., Craig v. Boren*, 429 U.S. 190, 198, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (citing decisions that "rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications"). And while the Court has differentiated the level of scrutiny applied to expenditure restrictions and contribution restrictions, *see Shrink Missouri*, 528 U.S. at 386-88, 120 S. Ct. 897, we do not understand it to have relegated the latter to a mere matter of rational basis review. The Court has recently stated that "a contribution limit involving 'significant interference' with associational rights . . . [can] survive if the Government demonstrate[s] that contribution regulation [is] 'closely drawn' to match a 'sufficiently

important interest.'" *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897 (quoting *Buckley*, 424 U.S. at 25, 96 S. Ct. 612). This formulation requires something more exacting than rational basis review. As a result, a rationale of administrative convenience cannot successfully be advanced to sustain § 441b(a) and the FEC's sweeping regulatory ban at issue in this case.

Organizations that in substance pose no risk of "unfair deployment of wealth for political purposes" may not be banned from participating in political activity simply because they have taken on the corporate form. *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. The rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions. In neither case is there the threat of quid pro quo, monetary influence, or distortion corruption that the prohibitions seek to prevent. We cannot sustain a measure that drains lifeforce from democracy when that measure does not reflect the public interest that would warrant such a drastic step. A corporation that qualifies for an *MCFL* exception poses no special threat to the political process. *See MCFL*, 479 U.S. at 263, 107 S. Ct. 616 ("It is not the case . . . that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all."). As a consequence, neither NCRL's expenditures nor its contributions may be prohibited under the First Amendment.

4.

In making this determination, we seek only to respect the Supreme Court's basic pronouncement in *MCFL* on the role that nonprofit advocacy groups play in our political life. We do not think that other decisions undermine the Supreme Court's commitment to the expressive and associational values that these organizations promote. In *Austin*, the Supreme Court held that a state statute banning direct contributions could be applied to the Michigan State Chamber of Commerce, a nonprofit corporation. 494 U.S. at 654-55, 110 S. Ct. 1391. Although *Austin* did uphold a state ban on contributions as applied to the Chamber, the Court noted that the Chamber was established for many varied purposes and was not inherently a political advocacy group like MCFL. *Id.* at 661-65, 110 S. Ct. 1391. In fact, the Chamber's educational goals were "not expressly tied to political goals," and many of the Chamber's members, much like shareholders in a for-profit corporation, might be reluctant to withdraw their membership if they did not agree with the Chamber's political expression. *Id.* at 662-63, 110 S. Ct. 1391. The *Austin* Court also noted that the Chamber had for-profit members and did not exhibit the characteristics identified in *MCFL* that would require the state to grant an exemption. In contrast, we have earlier held that NCRL exhibits the precise characteristics identified in *MCFL* and is entitled to the *MCFL* exception. *NCRL I*, 168 F.3d at 714.

Similarly, we are not persuaded that the Court's decision in *NRWC* requires the sweeping holding that an absolute ban on nonprofit contributions is constitutional. In *NRWC*, the Court had to determine whether National Right to Work Committee ("NRWC"),

a nonprofit corporation, had violated 2 U.S.C. § 441b(b)(4)(C) by using its general funds to solicit contributions for its separate segregated political fund from persons who were not its "members." 459 U.S. at 198-99, 103 S. Ct. 552. The issues in *NRWC* were whether NRWC's mailing had been sent to persons who did not fall within the statutory definition of "member," and, if so, whether the restriction on soliciting only "members" was constitutional. *Id.* at 198, 200-01, 206-11, 103 S. Ct. 552. The *NRWC* Court did not decide the constitutionality of the corporate ban provision as applied to *MCFL*-type corporations. However, that is precisely the question that confronts us today.

The District of Columbia Circuit took the approach that we now adopt in determining whether the FEC could successfully bring a civil enforcement action against the National Rifle Association ("NRA") for allegedly impermissible contributions and expenditures made during different years. *FEC v. National Rifle Ass'n.*, 254 F.3d 173 (D.C. Cir. 2001). That court expressed the view that corporate ban provisions are valid only insofar as they prevent certain threats to the political process. *Id.* at 191-92. It held that corporations which do not pose such threats may not be subject to § 441b(a)'s restrictions regardless of whether the restriction is on expenditures or contributions. The D.C. Circuit noted, "As we read *MCFL* and *Austin*, the [FEC] must demonstrate that the NRA's political activities threaten to distort the electoral process through the use of resources that, as *MCFL* put it, reflect the organization's 'success in the economic marketplace' rather than the 'power of its ideas.'" *Id.* at 191 (quoting *MCFL*, 479 U.S. at 258-59, 107 S. Ct. 616). Since the FEC could not meet this burden with

respect to one of the years at issue, § 441b(a) could not constitutionally be applied to the NRA's contributions and expenditures during that year. *Id.* at 192-93.

5.

Finally, the FEC has failed to meet its other burden in this case. In addition to showing that a sufficiently important governmental interest justifies the prohibition on contributions in the statute and regulations, the FEC was required to prove that the provisions are closely drawn to match it. *Shrink Missouri*, 528 U.S. at 387-88, 120 S. Ct. 897. In *Buckley*, the Court held that a $1,000 *limit* on contributions to candidates for federal elective office by an individual or a group was constitutional because "the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues." 424 U.S. at 28-29, 96 S. Ct. 612. Yet, when a limit becomes a ban, the burden of demonstrating that the regulation is closely drawn becomes that much more difficult. This is especially the case when that ban, combined with the costs and burdens associated with forming a separate segregated fund, could effectively cripple small, nonprofit advocacy groups that may have few or no ties to the world inhabited by for-profit corporations.

As noted earlier, it is possible to respect the congressional interest in minimizing corruption and to simultaneously doubt that an all-out ban on contributions by nonprofit advocacy corporations is necessary to prevent this potential abuse. The government has not met its burden of showing that § 441b(a) is closely drawn as applied to nonprofit advocacy corporations when other means, such as contribution limits, are fully

available to address the important public interest in honest elections.

It is, of course, the task of Congress, not the courts, to set limits on campaign contributions. Such contribution limits for individuals, corporations, and political committees have withstood numerous constitutional challenges. *See Buckley*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659; *California Med. Ass'n v. FEC*, 453 U.S. 182, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981) (allowing limits on contributions to political committees). Such contribution limits reduce the risk that either individuals or for-profit corporations can circumvent FECA and § 441b(a) by establishing and utilizing nonprofit advocacy groups to funnel money that could not otherwise be placed into the pockets of political candidates. The utilization of an absolute ban on advocacy group contributions becomes especially suspect when more closely drawn and widely utilized means, such as contribution limits, exist to address the asserted problem.

In sum, the issue is whether political associations that are incorporated, but present no risk whatever to the political process, *see MCFL*, 479 U.S. at 263, 107 S. Ct. 616, may be altogether prohibited from making contributions or expenditures out of their general treasuries simply by virtue of their corporate status. The district court correctly found "the distinction between contributions and expenditures to be immaterial in this case." *Beaumont v. FEC*, 137 F. Supp. 2d 648, 657 (E.D.N.C. 2000). The issue is whether the FEC has demonstrated a sufficient interest "in *prohibiting* even limited contributions by *all* corporations, even those that 'do[ ] not pose such a threat.'" *Id.* (quoting *MCFL*, 479 U.S. at 263, 107 S. Ct. 616). Because we find that the FEC has not met this burden, we hold that the

absolute ban on contributions and expenditures in § 441b(a) and its implementing regulations cannot constitutionally be applied to NCRL. If we held otherwise, we believe we would be effectively eviscerating the political role of nonprofit advocacy groups highlighted by the Supreme Court in *MCFL*.

III.

The plaintiffs ask us to go beyond the district court's decision that § 441b(a) and its implementing regulations are unconstitutional as applied to NCRL, and hold these provisions facially unconstitutional. This step would fly in the face of Supreme Court precedent, and we decline to take it.

A ruling of facial invalidity based on overbreadth "is, manifestly, strong medicine. It has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). *See also Bd. of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 484-85, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989); *Colorado I*, 518 U.S. at 623-24, 116 S. Ct. 2309. Thus, rulings of facial invalidity are distinctly disfavored as a brusque intrusion on the legislative branch and a real breach of the separation of powers. A court properly holds a statute facially invalid only where "the over-breadth [is] substantial . . ., judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S. Ct. 2908.

Applying this test, we agree with the district court's conclusion that § 441b(a) is not facially overbroad. Despite the list of nonprofit, tax-exempt corporations that the plaintiffs compiled in support of its overbreadth claim, the district court properly found that

they had failed as an empirical matter "to demonstrate that the constitutional infringements caused by [§ 441b(a)] and the related regulations are 'substantial' in relation to their 'plainly legitimate sweep.'" First, the plaintiffs fail to distinguish between those nonprofit corporations that are exempt and those that are not. And the Court held in *Austin* that an almost identical state statute may be properly applied to some nonprofit corporations. *See* 494 U.S. at 661-65, 110 S. Ct. 1391.

Second, even if we were to assume that every one of the corporations on the plaintiffs' list are entitled to an exemption, no calculations are necessary to conclude that hundreds or even thousands of constitutionally protected advocacy groups pale in comparison to the infinitely larger number of for-profit corporations that exist in this country. And the plaintiffs do not suggest that § 441b(a) and the regulations are unconstitutional with respect to for-profit corporations, not to mention the many labor organizations and national banks to which the provisions also apply. Indeed, the Supreme Court and other courts have upheld § 441b(a)'s validity in routine applications. *See, e.g., NRWC*, 459 U.S. at 207-211, 103 S. Ct. 552; *Nat'l Rifle Ass'n*, 254 F.3d at 191-92 (upholding application of § 441b(a) for certain years); *Mariani* v. *United States*, 212 F.3d 761, 773 (3d Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1010, 121 S. Ct. 564, 148 L. Ed. 2d 484 (2000). In short, the plaintiffs cannot establish substantial overbreadth in this case.

A further fatal flaw in the plaintiffs' overbreadth position is that the Supreme Court has rejected it. In *Austin*, the Court held that a state statute, modeled on § 441b(a) and almost identical to it, was "not substantially overbroad." 494 U.S. at 661, 110 S. Ct. 1391.

The Court then went on to apply the *MCFL* exception, which was not contained in the statute, to determine whether the statute was constitutional as applied. *Id.* at 661-65, 110 S. Ct. 1391. Thus, the plaintiffs' argument that § 441b(a) is facially invalid because its text does not contain an *MCFL* exception fails in view of the Court's own refusal in *Austin* to declare an almost identical state statute facially invalid for the same reason. The Supreme Court has consistently endorsed as-applied rulings in reviewing the constitutionality of FECA and analogous state statutes. *See Colorado II*, 533 U.S. 431, 121 S. Ct. 2351, 150 L. Ed. 2d 461; *Colorado I*, 518 U.S. at 613-14, 623-26, 116 S. Ct. 2309; *Austin*, 494 U.S. at 661-65, 110 S. Ct. 1391; *MCFL*, 479 U.S. at 263-64, 107 S. Ct. 616; *Buckley*, 424 U.S. at 68-74, 96 S. Ct. 612. Indeed, *MCFL* explicitly anticipated the possibility that only a "small" group of corporations would be exempt from § 441b(a)'s prohibitions on independent expenditures. 479 U.S. at 264, 107 S. Ct. 616.

Finally, Congress included a severability clause in FECA that provides for retaining as much of the statute as possible where it is found invalid in particular applications. Specifically, the clause states that "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby." 2 U.S.C. § 454. Congress has made its intent clear. And after applying conventional overbreadth doctrine in this case, we see no reason to frustrate it.

For all of these reasons, we hold that § 441b(a) and the associated regulations are not facially overbroad. Whatever overbreadth exists "should be cured through

case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick*, 413 U.S. at 615-16, 93 S. Ct. 2908. If every partial constitutional shortcoming in a statute mandated its wholesale demise, the courts would assume for themselves more fearsome powers than our Constitution posits.

IV.

This court would not lightly conclude that any federal statute was unconstitutional in any of its applications. We also view seriously the interest in keeping American elections rigorously honest, as well as expressively robust. However, it is important to consider in perspective the sweeping nature of the position that the FEC is urging us to take. The Commission asks us to hold that an absolute ban on every direct contribution by every nonprofit advocacy corporation in America is altogether legitimate. No matter how small the organization, no matter how modest the contribution, and no matter how absent the threat the group poses to the political process, the FEC argues that the contribution can be prohibited.

This position overlooks the difference between for-profit corporations and nonprofit advocacy groups funded overwhelmingly by individual donors who simply happen to believe in their ideas. An advocacy group, the Supreme Court has noted, does not "merely pose[ ] less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all." *MCFL*, 479 U.S. at 263, 107 S. Ct. 616. Yet the FEC would require that the full panoply of regulatory requirements be imposed upon nonprofit corporations before they can begin to participate in the political

process in what the Supreme Court has emphasized is a meaningful and important way. *See* 2 U.S.C. §§ 432, 433, 434, and 441b(b)(4)(A) and (C). Viewed in this light, the step we take is a cautious and modest one. It is only the consequences of failing to take it that would loom immeasurably large for the vitality of the democratic system of government that the First Amendment is intended to protect.

In its order of judgment of January 24, 2001, the district court declared that 2 U.S.C. § 441b and 11 C.F.R. §§ 114.2(b) and 114.10 were unconstitutional as applied to NCRL, a non-profit, *MCFL*-type corporation. The court therefore permanently enjoined the FEC from prosecuting the plaintiffs for violations of § 441b and 11 C.F.R. §§ 114.2(b) and 114.10. For the foregoing reasons, its judgment is

AFFIRMED.

WIDENER, Circuit Judge, concurring and dissenting.

I concur in the result of affirmance and in all of the opinion of Judge Wilkinson, with the exception of Part III.

As to part III, I am of opinion we should decline to consider the broader question of whether 2 U.S.C. § 441b(a) and its implementing regulations are facially unconstitutional, that being unnecessary to an affirmance. I would follow Rule 2 of *Ashwander*: "The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . . . It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Ashwander* v. *TVA*, 297 U.S. 288,

341, 346-347, 56 S. Ct. 466, 80 L. Ed. 688 (1935) (Justice Brandeis concurring, internal quotations and citations omitted).

GREGORY, Circuit Judge, concurring in part and dissenting in part.

I concur in Parts II.C.1 and II.C.2 of the court's opinion. I agree that, insofar as independent expenditures are concerned, this case is controlled by *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000). I also concur in Part III of the Court's opinion; § 441b(a) is not substantially overbroad. I respectfully dissent, however, from Parts II.C.3 through II.C.5. That portion of the opinion, which holds that NCRL must be given an *MCFL*-type exemption for its campaign contributions, is inconsistent with *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982) ("*NRWC*"). I would join the Sixth Circuit in upholding § 441b(a)'s ban on contributions by non-profit ideological corporations such as NCRL. *Kentucky Right To Life, Inc.* v. *Terry*, 108 F.3d 637 (6th Cir. 1997).

I see no way to avoid the import of the Supreme Court's analysis in *NRWC*. *See also FEC* v. *Nat'l Conservative PAC*, 470 U.S. 480, 495, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985) (noting that *NRWC* upheld "the prohibition of corporate campaign contributions"). The majority relies almost exclusively on *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) ("*MCFL*"), to reach its result. In doing so, however, the majority turns a blind eye not only to *NRWC*, but to the extended discussion of *NRWC* contained in both the *MCFL* majority and

dissenting opinions. This subsequent endorsement of the holding of *NRWC*, adhered to by every Member of the Court, confirms the validity of § 441b(a)'s ban on corporate contributions, even as applied to non-profit corporations such as NCRL.

In *NRWC*, the Supreme Court addressed § 441b's regulation of corporate campaign contributions as applied to non-profit corporations. Specifically, the Court considered the scope of the exemption contained in § 441b(b)(2)(C) and §§ 441b(b)(4)(A) and (C) to § 441b(a)'s ban on corporate contributions and expenditures. 459 U.S. at 207-11, 103 S. Ct. 552. Section 441b(b)(2)(C) exempts "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation. . . ." Sections 441b(b)(4)(A) and (C) further define the scope of the exemption by limiting "solicitation of contributions" by corporations without capital stock to its "members." The issue in *NRWC* was whether the corporation had "limited its solicitation of funds to 'members'," but that specific question was "but the tip of the statutory iceberg" because the solicitation of funds was part of an exemption from the general rule prohibiting corporate contributions. *Id.* at 198, n.1, 103 S. Ct. 552.

The Court found two purposes sufficient to justify § 441b's "prohibitions and exceptions." The first purpose was "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributors." *Id.* at 207, 103 S. Ct. 588. The second purpose was "to protect the individuals who

have paid money into a corporation . . . for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 208, 103 S. Ct. 588.

NRWC was a non-profit corporation similar to MCFL and NRCL, funded by solicitations that "would neither corrupt officials nor coerce members of the corporation holding minority political views. . . ." 459 U.S. at 207, 103 S. Ct. 552. The definition NRWC sought for the term "members" would only include persons who were "philosophically compatible" with the corporation. *Id.* at 206, 210, 103 S. Ct. 552; *see also MCFL*, 479 U.S. at 269, 107 S. Ct. 616 (Rehnquist, C.J., dissenting). But the Court "declined the invitation to modify the statute to account for the characteristics of different corporations," *MCFL*, 479 U.S. at 269, 107 S. Ct. 616, finding that § 441b was "sufficiently tailored" to "avoid undue restriction" on NRWC's First Amendment rights:

> In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation. Nor will we second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared. As we said in *California Medical Association* v. *FEC*, 453 U.S. 182, 201, 101 S. Ct. 2712, 69 L. Ed. 2d 567 (1981), the

> "differing structures and purposes" of different entities "may require different forms of regulation in order to protect the integrity of the electoral process."

NRWC, 459 U.S. at 209, 103 S. Ct. 552 (citations omitted). Repeating the acknowledged interests in preventing corruption and the appearance of corruption, the Court concluded that "there is no reason why it may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.* at 208, 210, 103 S. Ct. 552; *Buckley* v. *Valeo*, 424 U.S. 1, 26-27, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976); *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 788, n. 26, 98 S.Ct. 1407, 55 L. Ed. 2d 707 (1978).

I understand the majority's point that *NRWC* dealt with the definition of "members" for § 441b segregated fund solicitations purposes, but the *NRWC* Court's discussion of the exception cannot be so easily divorced from its discussion of the general rule. In considering the scope of the exception to § 441b's prohibition, the Court also considered the prohibition itself. Indeed, the Court's analysis of the exception was largely determined by the need to give broad prophylactic effect to the ban on corporate contributions.

The majority rejects *NRWC* in favor of *MCFL*, arguing that the Constitution ought to view § 441b's ban on contributions the same as it views the ban on expenditures. The respective discussions in both the majority and dissenting opinions in *MCFL* demonstrate that the Supreme Court struggled with this very question. Chief Justice Rehnquist, writing in dissent in *MCFL*, and joined by three other Justices, took the view that there was no constitutional difference between contributions and independent expenditures in

the context of § 441b. 479 U.S. at 270, 107 S. Ct. 616. According to the Chief Justice's view, *NRWC* required a finding of constitutionality in *MCFL*. See *MCFL*, 479 U.S. at 269, 107 S. Ct. 616 ("I would have thought the distinctions drawn by the Court today largely foreclosed by our decision in *NRWC*."). Justice Brennan, writing for a majority of the Court, thought otherwise, specifically distinguishing *NRWC* by noting that *NRWC* involved direct contributions to candidates:

> *[T]he political activity at issue in that case was contributions* . . . . (citations omitted.) We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. (citations omitted.) In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money *for direct contributions to candidates*. The limitation on solicitation in this case, however, means that nonmember corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. Regulation that would produce such a result demands far more precision than § 441b provides. Therefore, the desirability of a broad prophylactic rule cannot justify treating alike business corporations and [MCFL] in the regulation of independent spending.

MCFL, 479 U.S. at 260, 107 S. Ct. 616 (emphasis added).

If *MCFL* had not mentioned *NRWC*, I might question its continuing vitality. The amount of deference shown to legislative judgment certainly differs between *NRWC* and *MCFL*. *Compare NRWC*, 459 U.S. at 210, 103 S. Ct. 552 ("[W]e accept Congress's judgment that it is the potential for such influence that demands regulation."), *with MCFL*, 479 U.S. at 260, 107 S. Ct. 616 ("Regulation that would produce such a result demands far more precision than § 441b provides."). Or if the Court in *MCFL* had distinguished *NRWC* in the way the majority does here, instead of going out of its way to confirm *NRWC* as applied to corporate contributions, I might be persuaded by the majority in this case. But the Court took neither of those two options, instead expressly reaffirming *NRWC*, and explaining it as a contributions case. After considering this caselaw, I cannot escape the conclusion that *NRWC* is dispositive with respect to § 441b's ban on corporate contributions. I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION

No. 2:00-CV-2-BO-2

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, PRESIDENT OF NORTH CAROLINA RIGHT TO LIFE, INC., AND NORTH CAROLINA RIGHT TO LIFE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

Oct. 3, 2000

ORDER

TERRENCE WILLIAM BOYLE, Chief Judge.

This matter is before the Court on the Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Partial Dismissal and for Partial Summary Judgment. In the underlying action, Plaintiffs challenge 2 U.S.C. § 441b(a) (banning corporate contributions and expenditures in connection with federal elections), 11 C.F.R. § 114.2(b) (prohibiting all corporate contributions to federal candidates and all expenditures made by non-"qualifying" corporations), and 11 C.F.R. § 114.10 (making a narrow exception to the ban on

corporate expenditures for certain "qualified" non-profit corporations).

Plaintiffs seek both declaratory and injunctive relief with respect to the challenged provisions and have moved for Summary Judgment. Defendant, Federal Election Commission (the "Commission" or "FEC"), has moved for Partial Summary Judgment and Partial Dismissal in response to Plaintiffs' Motions. For the reasons discussed below, the challenged provisions violate NCRL's First Amendment rights without a compelling interest. Plaintiffs' Motion for Summary Judgment will be granted and Defendant's Motion for Partial Summary Judgment and Partial Dismissal will be denied. The extent of the declaratory relief to be given has yet to be determined by the Court. The effect of this ruling is stayed until the Parties submit Memoranda on this issue as directed in the Conclusion to this Order.

BACKGROUND

Plaintiff North Carolina Right to Life, Inc. ("NCRL") is a non-profit corporation, exempt from federal taxation under § 501(c)(4) of the Internal Revenue Code. NCRL engages in various charitable practices, which include providing crisis pregnancy counseling, publishing crisis pregnancy literature and promoting alternatives to abortion. Verified Complaint at ¶ 13. NCRL has no shareholders, nor does any part of its net earnings inure to the benefit of any individual. Verified Complaint at ¶¶ 11, 14. Plaintiff Christine Beaumont is an eligible voter in North Carolina, Plaintiff Loretta Thompson is Vice President of NCRL, Plaintiff Stacy Thompson is a member of the Board of Directors of NCRL, and Plaintiff Barbara Holt is President of NCRL. Verified Complaint at ¶¶ 4-7.

Defendant, Federal Election Commission, is the independent federal agency with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Federal Election Campaign Act (the "Act"). 2 U.S.C. 437g(a)(5), 437g(c).

Plaintiffs commenced this action on January 3, 2000, by filing a complaint seeking declaratory and injunctive relief. Plaintiffs challenge the constitutionality of prohibitions on corporate independent expenditures and contributions in connection with political activity contained in the Federal Election Campaign Act and regulations promulgated thereunder.

Plaintiffs argue that: (1) 2 U.S.C. § 441b(a) and 11 C.F.R. 114.10 prohibit NCRL from making independent expenditures in connection with federal elections in violation of their First Amendment freedoms of expression and association; and (2) 2 U.S.C. § 441b and 11 C.F.R. § 114.10 ban contributions by all corporations, including NCRL, and thus infringe NCRL's First Amendment rights. Plaintiffs seek declaratory and injunctive relief in connection with these grievances.

This Court held a hearing on this matter on September 18, 2000. Parties' motions are ripe for ruling.

DISCUSSION

I. Motions for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). To avoid summary judgment, the opposing party must

introduce evidence to create an issue of material fact on "an element essential to the party's case, and on which the party will bear the burden of proof at trial." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986).

II. Legal Framework

The importance of campaign contributions and expenditures as political speech is beyond question. Such speech is central to the "unfettered interchange of ideas" in the political sphere. *Roth* v. *United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). As a result, limitations on political contributions and expenditures "operate in an area of the most fundamental First Amendment activities," *Buckley* v. *Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), implicating the closely-guarded freedoms of expression and association.

The Supreme Court has upheld these freedoms in the context of organizational speech. In *Buckley*, the Court stated that "[g]roup association is protected because it enhances 'effective advocacy.'" *Buckley*, 424 U.S. at 65, 96 S. Ct. 612. Importantly, individuals contribute to organizations "because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction." *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 261, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986) (hereinafter "*MCFL*").

The First Amendment freedoms of *corporations* are not absolute. Stemming from a "concern over the corrosive influence of concentrated corporate wealth," *id.* at 257, 107 S. Ct. 616, the Federal Election Campaign Act significantly restricts corporate activity in

the political realm. The Act is part of a "history of regulation of corporate political activity" that has sought to prevent corporate "'political war chests'" from hampering the integrity of the marketplace of political ideas. *Id.* at 257, 107 S. Ct. 616. Recognizing such threats, "the Supreme Court has, in some circumstances, upheld complete prohibitions on both corporate political contributions . . . and independent expenditures." *North Carolina Right to Life* v. *Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153, 120 S. Ct. 1156, 145 L. Ed. 2d 1069 (2000) (hereinafter "*NCRL I*").

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986), the Supreme Court held that the state interest in regulating corporate political activity must be weighed against corporations' valid First Amendment freedoms. The regulation of corporate political speech reflects a concern "not about the corporate form per se, but about the potential for unfair deployment of wealth for political purposes," *MCFL*, at 259, 107 S. Ct. 616. The Supreme Court determined that the 2 U.S.C. § 441b ban on corporate independent expenditures could not constitutionally be applied to MCFL, a non-profit, non-stock corporation with an ideological purpose. *Id.* at 252, 107 S. Ct. 616.

The Court reasoned that certain non-profit, ideological corporations pose no threat to the political marketplace. *See MCFL*, at 263, 107 S. Ct. 616 ("It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all.") The Court concluded that "the concerns underlying the regulation of corporate political activity are simply absent with

respect to" such ideological, non-profit corporations. *Id.* at 263, 107 S. Ct. 616. They held that "§ 441b's restriction of independent spending . . . infringes protected speech without a compelling justification for such infringement." *Id.* at 263, 107 S. Ct. 616.

The Court set forth three characteristics "essential" to MCFL's exemption: (1) it was formed for the express purpose of promoting political ideas and cannot engage in business activities; (2) it had no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and (3) it was not established by a business corporation or a labor union and had a policy not to accept contributions from such entities. *MCFL*, at 264, 107 S. Ct. 616.

In *NCRL I*, the Fourth Circuit determined that the list of characteristics in *MCFL* "was not 'a constitutional test for when a nonprofit must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*,'" *NCRL*, at 714 (quoting *Day* v. *Holahan*, 34 F.3d 1356, 1363 (8th Cir. 1994)). With that established, the Circuit Court considered whether the same organization in this case, NCRL, belonged in the category of corporations that "does not pose . . . a threat" to the political marketplace. *MCFL*, at 263, 107 S. Ct. 616.

NCRL would have failed to qualify as an *MCFL*-exempt corporation under a strict application from that case, because it accepted an insignificant amount of corporate contributions. The Court held that the "crucial question is not whether NCRL has a policy against accepting corporate contributions, but whether . . . it is serving as a conduit for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace." *NCRL I*, at 714.

Finding that corporate contributions made to NCRL were "not of the traditional form" and, moreover, that NCRL "display[ed] all the typical characteristics of the nonprofit form," the Circuit Court determined that NCRL "falls squarely within the MCFL exception." *Id.*, at 714.

The Circuit Court then held that the North Carolina statutes "fail[ed] 'to distinguish between corporations which pose a threat to the integrity of the political process and those which do not.'" *Id.*, at 714. Lacking such an important distinction, the statutes infringed First Amendment freedoms without a compelling state interest and were therefore declared "unconstitutionally overbroad." *Id.*, at 714.

NCRL now asks this Court to examine similar issues in the federal context. The federal statute and regulations, on their face, constitute an absolute bar to NCRL making contributions to or independent expenditures on behalf of a candidate for federal office. Such a burden on NCRL's First Amendment rights may be upheld only upon a showing that it is narrowly-tailored to further a compelling governmental interest. *Buckley* v. *Valeo*, 424 U.S. 1, 44-45, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

III. 2 U.S.C. § 441b(a) Ban on Corporate Expenditures

Plaintiffs first challenge the 2 U.S.C. § 441b(a) ban on corporate expenditures. 2 U.S.C. § 441b(a) makes it "unlawful for any . . . corporation to make a[n] . . . expenditure in connection with any election to any political office." 2 U.S.C. § 441b(a) fails to distinguish between innocuous corporations, such as NCRL, and corporations that, as "political war chests," pose a real

and perceived threat to the political process. Instead, it prohibits "any corporation" from making independent expenditures in connection with elections.

As discussed above, the Supreme Court held this statute unconstitutional as applied to Massachusetts Citizens for Life, a non-profit, ideological corporation similar to NCRL. MCFL was deemed "more akin to [a] voluntary political association[ ] than [a] business firm[ ]," *MCFL*, at 263, 107 S. Ct. 616. Given that MCFL posed no threat to the political marketplace, the Court found that 2 U.S.C. § 441b(a) prohibited MCFL from making independent expenditures "without a compelling justification for such infringement." *MCFL* at 263, 107 S. Ct. 616.

In *NCRL I*, the Fourth Circuit held that a similar ban on corporate independent expenditures was unconstitutional. The Court determined that NCRL qualifies as an MCFL-type corporation, for which the interest in regulating political activity is not compelling. *NCRL I*, at 714 ("NCRL falls squarely within the MCFL exception."). The FEC states that "the [*NCRL I*] opinion is clear and controlling as to NCRL's entitlement to a constitutional exemption from 2 U.S.C. 441b's prohibition of corporate expenditures . . . ." Def. Mem. in Supp. at 20. This Court agrees. Given that NCRL falls "squarely within" the category of non-threatening, MCFL-type organizations, *NCRL I* at 714, NCRL poses no threat to the political forum. This Court therefore holds that the § 441b(a) ban on independent expenditures violates NCRL's First Amendment rights without a compelling interest.

IV. 11 C.F.R. § 114.10—Limited Exemption from the § 114.2(b) Ban on Corporate Expenditures

Plaintiffs next challenge 11 C.F.R. § 114.10. 11 C.F.R. § 114.2(b) prohibits "[a]ny corporation whatever . . . from making a contribution . . . in connection with any Federal election [and] [e]xcept as provided at 11 C.F.R. 114.10 . . . from making expenditures with respect to a Federal election." After *MCFL*, it was clear that the ban on corporate expenditures could not be applied indiscriminately to all organizations that took the corporate form. *See MCFL*, 479 U.S. 238, 263, 107 S. Ct. 616, 93 L.Ed.2d 539 (1986). 11 C.F.R. § 114.10 thus reflects an effort by the FEC to comply with the exception for non-profit, non-threatening corporations that was carved out in *MCFL*.

Section 114.10 provides that certain "qualified nonprofit corporations" may be exempt from the prohibition on corporate independent expenditures. It defines a "qualified" nonprofit as one that satisfies the following criteria:

> (1) its only express purpose is the promotion of political ideas and it does not engage in business activities;
>
> (2) it has no shareholders, nor any other persons with any ownership interest or claim on assets or earnings or who receives any benefit that makes it a "disincentive for them to disassociate themselves with the corporation on the basis of a corporation's position on a political issue", including credit cards, education, etc.;
>
> (3) it was not established by a business corporation or labor organization nor does it "directly or

indirectly accept donations of anything of value from business corporations"; and

(4) it is a non-profit under 26 U.S.C. 501(C)(4). 11 C.F.R. § 114.10(c)(1)-(5).

NCRL sets forth a number of characteristics pertinent to the application of § 114.10 to its case:

(1) NCRL is a non-profit corporation that is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code;

(2) NCRL was not established by a business corporation or labor union, and has no shareholders or other affiliates who have a claim on its assets or net earnings;

(3) NCRL is a "public service organization" that has as its "purpose . . . to gather and disseminate, by all means of communication, accurate up-to-date information on the subjects of abortion, euthanasia . . . their effects on the victim family, the community . . . and to further work for pro-life alternatives to abortion" as well as to "make donations for the public welfare, or for religious, charitable, scientific or educational purposes";

(4) While primarily funded by private contributions from individuals, NCRL has accepted contributions from business corporations in the past. These contributions were insignificant in relation to the total contributions from individuals, and were derived almost exclusively from a program by which telephone customers directed their phone bill refunds to the non-profit at their election.

Verified Complaint at & & 10-12.

NCRL may fall "squarely within" the *MCFL* exemption, *NCRL I*, at 714, but it falls squarely outside the terms of § 114.10. Because of the insignificant contributions it has received from corporations, NCRL fails to meet the requirement that it "not directly or indirectly accept donations . . . from business corporations." 11 C.F.R. § 114.10(c)(4).

Furthermore, NCRL has "engaged in traditional fundraising activities of nonprofit corporations, such as walk-a-thons and raffles, and engages in minor business activities incidental and related to its advocacy of issues, such as receiving special event revenue . . . and revenue from distributing its pro-life literature." Verified complaint at ¶ 25. Such activities qualify as "business activities," further disqualifying NCRL under 11 C.F.R. § 114.10(c)(2).[1]

The FEC's construction of the "qualified non-profit corporation" exemption is a "formal" interpretation of the holding in *MCFL*. Such an approach has been rejected by the Eighth Circuit in *Day* v. *Holahan*, 34 F.3d 1356 (8th Cir. 1994), cert. denied, 513 U.S. 1127, 115 S. Ct. 936, 130 L. Ed. 2d 881 (1995) (stating that "[t]he state goes too far in concluding that the factual findings of MCFL translate into absolutes in legal application") and the Second Circuit in *Federal Election Commission* v. *Survival Education Fund, Inc., et al.*, 65 F.3d 285 (1995) (holding that "[t]he rigidity with

[1] "Business activities" are defined as anything other than "fundraising activities that are expressly described as requests for donations that may be used for political purposes". 11 C.F.R. § 114.10(b)(3)(B)(ii).

which the FEC would have us apply MCFL would impoverish political debate").

Such a strict interpretation of *MCFL* has been rejected in this Circuit. The Court in *NCRL I* "agreed with those circuits that have addressed the question, each of which has held that the list of nonprofit corporate characteristics in MCFL was not 'a constitutional test for when a nonprofit must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence to the facts in MCFL.'" *NCRL I*, at 417.

By excluding NCRL from the category of "qualified nonprofit corporations," § 114.10 results in a continued infringement of NCRL's constitutional rights, as secured by the First Amendment under *NCRL I*. The Commission admits that "the [*NCRL I*] opinion is clear and controlling" and that NCRL is thus has a "right to make independent expenditures in connection with federal elections" Def. Mem. in Supp. at 20, 21. However, the Commission argues that Plaintiffs therefore lack standing to contest § 114.10. This Court disagrees.

In order to demonstrate standing, a party must show that: (1) it has suffered an injury in fact; (2) there is a causal connection between the injury and the challenged regulation; and (3) there is a likelihood that the injury will be redressed by a favorable decision of the court. *Burke* v. *City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998).

The Commission claims that, as an "exempt" corporation under *NCRL*, NCRL has not and will not in the future be subject to an enforcement action by the FEC under § 114.2(b). They therefore argue that NCRL has suffered no injury. It is well-settled that "[w]hen a plaintiff faces a credible threat of prosecution

under a criminal statute he has standing to mount a pre-enforcement challenge to that statute." *Bartlett*, 168 F.3d. at 710. This "credible threat" will be found, and a case or controversy will exist, where a "non-moribund" statute "facially restrict[s] expressive activity by the class to which the plaintiff belongs" and there is an absence of compelling evidence to the contrary. *New Hampshire Right to Life PAC* v. *Gardner*, 99 F.3d 8, 15 (1st Cir. 1996).

In this case, 11 C.F.R. § 114.2(b), on its face, prohibits independent expenditures by non-qualifying corporations. 11 C.F.R. § 114.10(c)(2) and (c)(4) bar NCRL from achieving "qualified" status. Despite the FEC's unenforceable promise to exercise self-restraint in the matter, NCRL's officers remain subject to criminal liability under these statutes. Because it would be unlawful for them to do otherwise, Plaintiffs have withheld their consent to make independent expenditures out of NCRL's general treasury. Verified Complaint at ¶¶ 33, 34. The injury in this case is therefore "one of self-censorship; a harm that can be realized even without an actual prosecution," *Virginia* v. *American Booksellers Association*, 484 U.S. 383, 393, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). Because the Plaintiffs' speech has been chilled as a result of § 114.10, an infringement which may be redressed by a ruling of this Court, the Plaintiffs have clearly established standing in this case.

This Court has found that NCRL has a constitutional right to make independent expenditures in connection with federal elections under *MCFL* and *NCRL I*. Section 114.10, by its terms, prohibits NCRL from doing so. Therefore, 11 C.F.R. § 114.10 violates NCRL's pro-

tected First Amendment rights without a compelling interest.

V. 2 U.S.C. § 441b(a) and 11 C.F.R. 114.2(b) Ban on Corporate Contributions

Plaintiffs next challenge the ban on corporate contributions set forth in 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b). 2 U.S.C. § 441b(a) states that "[i]t is unlawful for any . . . corporation . . . to make a contribution . . . in connection with any election to any political office." 11 C.F.R. § 114.2(b) states that "[a]ny corporation whatever or any labor organization is prohibited from making a contribution . . . in connection with any Federal election."

It is well established that direct contributions to political candidates implicate important First Amendment rights, specifically, the textual rights to speech and to petition the government for a redress of grievances, and the non-textual right to associate. "[T]he right of association is a 'basic constitutional freedom,' . . . that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.'" *Buckley*, 424 U.S. at 24-25, 96 S. Ct. 612 (citations omitted). "In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.'" *Id.* at 25, 96 S. Ct. 612.

In the instant case, 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) clearly burden the associational rights of NCRL and other ideological, non-stock, non-profit corporations by prohibiting them from making direct contributions to candidates. The FEC argues that the impact of this burden is lessened by the availability of a

"segregated fund" option. Def. Mem. at 6. Indeed, by virtue of its incorporated status, NCRL *must* form a segregated fund in order to make a limited, direct contribution to a candidate for public office. 2 U.S.C. § 441b(2) allows for such a fund by stating that: "[t]he term contribution . . . shall not include . . . the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation . . . ." 2 U.S.C. § 441b(b)(2).

However, in *MCFL*, in the context of independent expenditures, the Supreme Court emphasized the burdensome nature of such funds. Segregated funds are "political committees" under the Act. 2 U.S.C. § 431. They must therefore adhere to significant reporting requirements, staffing requirements and other administrative burdens. *See* 2 U.S.C. § 432. The Supreme Court noted that these "more extensive requirements and more stringent restrictions . . . may create a disincentive for such organizations to engage in political speech." *MCFL*, at 254, 107 S. Ct. 616.

The segregated fund requirement clearly burdens the First Amendment rights of NCRL. "It is not unreasonable to suppose that . . . an incorporated group of like-minded persons might seek donations to support [contributions to] political candidates, by means of garage sales, bake sales, and raffles. Such persons might be turned away by the prospect of complying with all the requirements imposed by the Act." *MCFL*, at 255, 107 S. Ct. 616. Whether the frustrated contributor is North Carolina Right to Life, Inc.,[2]

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[2] Using the reasoning set forth in *MCFL*, the "fact that [NCRL] established a political committee . . . does not change

California Citizens for the Blind, Inc., or Kentucky People for the Trees, Inc., denying such an organization the right to perform the "symbolic act of contributing," *Buckley*, at 21, 96 S. Ct. 612, and thus to associate with candidates espousing similar views is an infringement on First Amendment rights that demands a compelling justification. No such justification is present here.

The FEC argues that *Federal Election Commission et al.* v. *National Right to Work Committee et al.*, 459 U.S. 197, 103 S. Ct. 552, 74 L. Ed. 2d 364 (1982) (hereinafter "*NRWC*") set forth compelling justifications for the regulation of corporate contributions. The government interests identified in *NRWC* were: (1) to prevent the "substantial aggregation of wealth" of corporations from being converted into "'political war chests' "used to incur political debts; and (2) to protect individuals who have paid money into a corporation or union for purposes other than the support of candidates. Def. Mem. at 10-12, 15. Neither interest is compelling in this case.

First, the fear of a " 'political warchest'" is misplaced with respect to NCRL. As an MCFL-type corporation, NCRL is "more akin to [a] voluntary political association[ ] than [a] business firm[ ]," *MCFL*, at 263, 107 S. Ct. 616, and "do[es] not pose the danger that has prompted regulation" of corporations in the past. *Id.* at 264, 107 S. Ct. 616. Because NCRL poses no potential threat in light of its non-profit, ideological nature, any

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this conclusion, for the corporation's speech may well have been inhibited due to its inability to form such an entity before that date. Furthermore, other organizations comparable to [NCRL] may not find it feasible to establish such a committee and may therefore decide to forego such speech." *MCFL*, at 255 n.7, 107 S. Ct. 616.

governmental interest in regulating the organization may not be deemed compelling simply by virtue of NCRL's "'use of the corporate form.'" *NCRL*, at 713.

Second, there is no danger of a dissenting shareholder or unionworker in the case of NCRL. The Supreme Court "acknowledged the legitimacy of this concern as to the dissenting stockholder and union member in [*NRWC*] and in *Pipefitters* . . . But such persons, as noted, contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends." *MCFL*, at 260, 107 S. Ct. 616 (citations omitted). By contrast, individuals who contribute to NCRL and other *MCFL*-type organizations are "fully aware of its political purposes, and in fact contribute precisely *because* they support those purposes." *Id.* at 260-61, 107 S. Ct. 616 (emphasis added).

The FEC seeks to distinguish *MCFL* from this case on the basis that "the decision in *MCFL* extended only to 'corporate expenditures.'" Def. Mem. in Supp. at 15. The FEC argues that contributions have been more easily regulated than independent expenditures in the past, so that the ban on corporate contributions may be constitutional as applied to NCRL, even though the corresponding ban on corporate independent expenditures is not. This Court finds the distinction between contributions and expenditures to be immaterial in this case.

A distinction between contributions and expenditures was suggested in *Buckley*, when the Court held that "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support", at 20-21. The Court noted that "the quantity of communi-

cation by the contributor does not increase perceptibly with the size of his contribution," *Buckley*, at 21, 96 S. Ct. 612, so that the First Amendment freedoms associated with such a contribution are exercised when the contribution is made—no matter how great or small its size.

This distinction is important in the context of *limitations*, as was the issue in *Buckley*. A contribution *limitation* "involves little direct restraint on . . . political communication, for it permits the symbolic expression of support evidenced by a contribution." *Buckley*, at 21, 96 S. Ct. 612. The issue in this case is not whether the government has a compelling interest in *limiting* contributions—under *Buckley*, it is clear that they do. Moreover, the state's general concerns in light of the "historical role [of direct contributions] in the corruptive process," *MCFL* at 260, 107 S. Ct. 616, are adequately and more directly addressed by the significant dollar limitations on direct contributions contained elsewhere in the Act. *See, e.g.*, 2 U.S.C. § 441a.

The question here is whether the FEC has demonstrated a compelling interest in *prohibiting* even limited contributions by *all* corporations, even those that "do [ ] not pose such a threat." *MCFL*, at 263, 107 S. Ct. 616. Since NCRL is "more akin to [a] voluntary political association than [a] business firm [ ]", *MCFL*, at 263, 107 S. Ct. 616, "the concerns underlying the regulation of corporate political *activity* are simply absent" with regard to NCRL. *Id.* at 263, 107 S. Ct. 616 (emphasis added). These concerns are absent with respect to political activity as a general matter-both in the context of limited contributions as well as independent expenditures. This Court therefore sees no

compelling state interest in banning corporate contributions by NCRL and denying it the opportunity to make "symbolic expression[s] of support," *Buckley*, at 21, 96 S. Ct. 612. Absent a compelling interest, the ban on corporate expenditures in 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) violates NCRL's protected First Amendment rights.

CONCLUSION

The Constitutional right of NCRL to make independent expenditures and limited contributions has been adequately established. For the reasons discussed above: (1) 2 U.S.C. § 441b clearly infringes that right, by prohibiting NCRL from making independent expenditures or contributions on behalf of a candidate; (2) 11 C.F.R. § 114.2(b) violates that right by prohibiting NCRL from making campaign contributions; and (3) 11 C.F.R. § 114.10 violates that right by failing to exempt NCRL from the § 114.2(b) ban on corporate independent expenditures.

Given that these provisions violate NCRL's constitutional rights without a compelling state interest, Plaintiffs are clearly entitled to declaratory and injunctive relief in this case. At a minimum, this Court may declare the provisions unconstitutional as applied to NCRL. Alternatively, if the First Amendment infringements are "substantial" as judged "in relation to the statute's plainly legitimate sweep," *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), this Court may deem them facially unconstitutional.

Whether the infringements in this case warrant such a declaration must be further addressed by the Parties before it is determined by the Court. Plaintiffs are

therefore ordered to submit a Memorandum on this issue within 20 days after the date of this Order. Defendant must submit its Response within 20 days after the Plaintiffs' submission. This Court withholds its judgment regarding Plaintiffs' declaratory and injunctive relief in connection with these grievances until such Memoranda are submitted.

For the reasons discussed above, Plaintiffs' Motion for Summary Judgment is hereby GRANTED to the extent that 2 U.S.C. § 441b(a), 11 C.F.R. § 114.2(b) and 11 C.F.R. § 114.10 violate NCRL's protected First Amendment right to make contributions and expenditures in connection with federal elections. However, the extent of relief associated with this Judgment will be set out in the Court's final order. Defendants' Motion for Partial Summary Judgment and Motion for Partial Dismissal are hereby DENIED. The effect of this ruling is hereby STAYED until the final order has been issued by the Court. The Court will award appropriate declaratory and injunctive relief at that time.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1348
CA-00-2

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLANT

No. 01-1479
CA-00-2

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS-APPELLANTS

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLEE

Filed: May 16, 2002

On Petition For Rehearing And Rehearing En Banc

Appeallant filed a petition for rehearing and rehearing en banc.

Chief Judge Wilkinson and Judge Widener voted to deny the petition for rehearing. Judge Gregory voted to grant rehearing.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of judges in active service in favor of rehearing en banc. Judges Micheal, Motz, King and Gregory voted to rehear the case en banc, and Chief Judge Wilkinson and Judges Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the discretion of Chief Judge Wilkinson for the Court.

For the Court,

/s/ PATRICIA S. CONNOR
CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA, NORTHERN DIVISION

No. 2:00-CV-2-BO(2)

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT, PRESIDENT OF NORTH CAROLINA RIGHT TO LIFE, INC., AND; NORTH CAROLINA RIGHT TO LIFE, INCORPORATED, PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Jan. 24, 2001]

ORDER

This matter is before the Court on Defendant's Motion to Extend Time and on the issue of the appropriate remedy to the awarded Plaintiffs in this case. On October 3, 2000, this Court held that NCRL's First Amendment rights were unconstitutionally infringed by the ban on corporate contributions and expenditures set forth at 2 U.S.C. § 441(b) and its implementing regulations, 11 C.F.R. § 114.2(b) and 11 C.F.R. § 114.10. The Court stayed the effects of its order pending briefing on the scope of appropriate relief to be awarded in this case. The parties have submitted briefs on this issue and it is ripe for ruling.

I. Background

Plaintiff North Carolina Right to Life, Inc. ("NCRL") is a non-profit corporation that engages in various charitable practices, which include providing crisis pregnancy counseling, publishing crisis pregnancy literature and promoting alternatives to abortion. NCRL has no shareholders, nor does any part of its net earnings insure to the benefit of any individual. Plaintiff Christine Beaumont is an eligible voter in North Carolina, Plaintiff Loretta Thompson is Vice President of NCRL, Plaintiff Stacy Thompson is a member of the Board of Directors of NCRL, and Plaintiff Barbara Holt is President of NCRL. Defendant, Federal Election Commission ("FEC"), is the independent federal agency with exclusive jurisdiction over the administration, interpretation and civil enforcement of the Federal Election Campaign Act (the "Act"). U.S.C. 437g(a)(5), 437g(c).

Plaintiffs commenced this action on January 3, 2000, by filing a complaint seeking declaratory and injunctive relief. In their complaint, Plaintiffs challenged the constitutionality of blanket prohibitions on corporate political activity that barrred them from making independent expenditures and contributions in connection with federal elections. The challenged prohibitions are contained in the Federal Election Campaign Act and regulations promulgated thereunder. Plaintiffs claimed that, as a non-profit, ideological corporation, NCRL could not be constitutionally subject to such an infringement on its freedom of expression.

After conducting a hearing on the matter and reviewing the briefs submitted by both parties, this Court found that the prohibitions contained in 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 114.2(b) and 114.10 infringed

NCRL's First Amendment rights without a compelling state interest. The fact that 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 unconstitutionally infringed Plaintiffs' rights entitles them to declaratory and injunctive relief in this case. The Court's present task is to determine what scope of remedy is appropriate to address Plaintiffs' injury.

II. Analysis

Plaintiffs argue that 2 U.S.C. § 441(b) and its implementing regulations should be held facially unconstitutional. They claim that the "corporate ban provisions are unconstitutional on their face" and that "[a]nything less than facial invalidation would amount to a judicial invasion of the legislative domain. . . ." Plaintiffs' Memorandum at 2.

However, a court that holds a statute *facially* unconstitutional departs from the traditional rule that courts adjudicate only the issues and the rights of the litigants that are actually before it. *See Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908 (1973) ("facial overbreadth adjudication is an exception to our traditional rules of practice. . ."). Therefore, for a statute to be "facially" invalid, rather than invalid as applied to a particular litigant, its constitutional infringements must be adjudged to be "substantial" in relation to its legitimate uses. *See id.* Therefore, an overbreadth question is "ordinarily more difficult to resolve than the as-applied, since it requires determination whether the statute's overreach is substantial, not only as an absolute matter, but judged in relation to the statute's plainly legitimate sweep." *Id.*

To support its contention that 2 U.S.C. § 441(b) satisfies this "substantial overbreadth" test, Plaintiffs

submit a long list of nonprofit, tax-exempt corporations. Plaintiffs claim that the list "is not nearly representative of all tax-exempt, nonprofit corporations" to which 2 U.S.C. § 441(b) would be illegally applied. On the basis of this list, and a similar list of "ideological corporations" located in North Carolina, Plaintiffs conclude that the statute's unconstitutional infringement is substantial in that it reaches "hundreds, if not thousands, of constitutionally protected ideological corporations."

While Plaintiffs are likely correct that a great number of corporations are entitled to a constitutional exemption from application of 2 U.S.C. § 441(b) and related regulations, Plaintiffs fail to demonstrate that the constitutional infringements caused by 2 U.S.C. § 441(b) and the related regulations are "substantial" in relation to their "plainly legitimate sweep."

First off, Plaintiffs' list of non-profit corporations across the nation fails to distinguish between those non-profit corporations that are entitled to be exempt from the expenditure and contribution bans and those non-profit corporations that should not be exempt. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391 (1990) (holding that a non-profit corporation with for-profit corporate members was not entitled to an exemption from the ban on independent expenditures). Therefore, they fail to provide the relevant national statistics that would show that the unconstitutional infringements caused by the statute and regulations on the national level are "substantial" as an absolute matter.

Moreover, Plaintiffs fail to prove substantiality of the statute's constitutional infringements as a *relative* matter. Plaintiffs claim that the reach of Section 441(b) extends to "hundreds, if not thousands, of constitutionally protected ideological corporations." Plaintiffs' Brief at 11. The Court has already discussed the insufficiency of the date used by Plaintiffs to support this claim. However, even assuming that there are "hundreds, if not thousands" of such corporations, Plaintiffs fail to show that such number is substantial in comparison to the number of for-profit corporations. As Defendants have shown, there were over 4.5 million for-profit corporations in 1997. For each of these 4.5 million for-profit corporations, the statute and promulgating regulations serve the state's compelling interest in preventing corruption or the appearance thereof. In light of these numbers and the importance of the statute's "plainly legitimate" purpose of regulating for-profit corporations, its inadvertent infringement on the rights of "hundreds, if not thousands" does not appear "substantial" in relation.

For the reasons stated in its order of October 3, 2000, this Court is satisfied that 2 U.S.C. § 441(b) and its implementing regulations, 11 C.F.R. §§ 114.2(b) and 114.10, are unconstitutional as applied to NCRL. However, "[i]t is our view that the statute is not substantially overbroad and that whatever overbreadth may exists may be cured through case-by-case analysis of the fact. . ." *See Broadrick*, 413 U.S. at 615.

III. Conclusion

Defendant's Motion to Extend Time to submit its Brief on Remedies is GRANTED. Accordingly, Defendant's Brief is part of the record upon which this Court bases its decision

For the foregoing reasons, the Court hereby declares that 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 are unconstitutional as applied to NCRL, a

non-profit, *MCFL*-type corporation. Defendants are therefore permanently ENJOINED from relying on, enforcing or prosecuting violations of sections 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provisions.

SO ORDERED

This 21st day of January, 2001.

/s/ TERRENCE W. BOYLE
TERRENCE W. BOYLE
CHIEF UNITED STATES
DISTRICT JUDGE

I certify the foregoing to be a true
and correct copy of the original
David W. Daniel, Clerk
United States District Court
Eastern District of North
Carolina
By /s/ SUE A. TOWE
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA, NORTHERN DIVISION

No. 2:00-CV-2-BO(2)

CHRISTINE BEAUMONT; LORETTA THOMPSON; STACY THOMPSON; BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Jan. 24, 2001]

JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that the Court hereby declares that 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 are unconstitutional as applied to NCRL, a non-profit, *MCFL*-type corporation. Defendants are therefore permanently ENJOINED from relying on, enforcing or prosecuting violations of sections 2 U.S.C. § 441(b) and 11 C.F.R. §§ 114.2(b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provisions. (Boyle, J)

THIS JUDGEMENT FILED AND ENTERED ON JANUARY 24, 2001 AND COPIES TO:

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DAVID W. DANIEL, CLERK

/s/ SUE A. TOWE
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(By) Deputy Clerk

APPENDIX E

STATUTORY PROVISION INVOLVED

Section 441b of Title 2 of the United States Code provides:

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b)(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation com-

mittee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or

financial reprisals; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their

residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

No. 02-403

In The

Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Petitioner*,

v.

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Brief in Opposition

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Counterstatement of Questions Presented

1. This Court held that the Federal Election Commission may not file a certiorari petition without authorization by the Solicitor General. *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). Is the Solicitor General authorized to petition where

> (a) the FEC--given special administrative, enforcement, and policy-formulation authority over federal election laws--decided *not* to ask the Solicitor General to petition,
>
> (b) there is no representation that the Solicitor General decided to petition "in consultation with [the FEC]" as required by 28 C.F.R. § 0.20, and
>
> (c) the Solicitor General is authorized to "[d]etermine whether and to what extent[] appeals will be taken" but is given only authority to "conduct[]" certiorari petitions, 28 C.F.R. § 0.20(a) & (b)?

2. This Court has held that the First Amendment protects expressive associations from restrictions permissible on other corporations. Is the federal corporate campaign contribution ban constitutional as applied to an expressive association of the sort held exempt from the independent expenditure ban in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986), because "it does not pose . . . a threat [of corruption to the political system] at all"?[1]

---

[1]Respondents strongly object to the Solicitor General's characterization of North Carolina Right to Life, Inc. in his Question Presented as having the "primary purpose" of "engag[ing] in political advocacy." This characterization is factually baseless and legally misleading. *See infra* at 1-7. Rule 15.2.

Parties to the Proceeding

The Solicitor General failed to provide the listing of parties to this case either in his caption or in a separate listing, as required by Rule 24.1(b). Therefore, Respondents provide the complete listing in the caption to this Brief.

Corporate Disclosure Statement

North Carolina Right to Life, Inc. has no parent company and issues no stock, so that there is no "publicly held company owning 10% or more of the corporation's stock." Rule 29.6.

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Counterstatement Concerning Jurisdiction

As stated more fully below in the Reasons for Denying the Writ, *infra* at 7-13, Respondents contend that this Court lacks jurisdiction to consider this petition for a writ of certiorari because the Solicitor General was not authorized to file the petition where (a) the Federal Election Commission decided not to pursue a certiorari petition, (b) there is no representation that the Solicitor General consulted with the FEC concerning the certiorari petition as required by the authorizing regulation, and (c) the authorizing regulation grants the Solicitor General the sole authority to "*[d]etermine whether*" to take *appeals* but only grants him authority to "*conduct*" cases taken to the Court on *certiorari petition*. 28 C.F.R. § 0.20 (emphasis added).

Counterstatement of the Case

Rule 24.1(g) requires that the statement of the case "set[] out the facts material to the consideration of the questions presented." The Solicitor General's "Statement" focuses largely on characterizing a line of cases he believes governs this case, which Respondents dispute in Reasons for Granting the Writ. *See infra* at 13-22.

Missing from the Solicitor General's history of the proceedings are the facts that (a) the FEC decided not to file a petition for a writ of certiorari in this case and (b) he did not decide to file this certiorari petition "in consultation" with the FEC. *See* 28 C.F.R. § 0.20. In an earlier footnote he concedes that "[t]he FEC did not request the Solicitor General to seek certiorari on its behalf in this case." *Petition* at 1, n.1.

Also missing from the Solicitor General's Statement are the facts about the corporate Respondent, North Carolina Right

to Life, Inc. ("NCRL"). Filling this vacuum is vital, especially in light of the Solicitor General's mischaracterization of NCRL in his framing of the Question Presented as "a nonprofit corporation whose primary purpose is to engage in political advocacy." *Petition* at I.

There is no evidence in the record that "political advocacy" (whatever the term "political" is intended to mean) is the "primary purpose" of NCRL. As stated by the Fourth Circuit:

> NCRL is a non-profit corporation, exempt from federal taxation under § 501(c)(4) of the Internal Revenue Code. NCRL is a charitable organization that, ***inter alia***, provides crisis pregnancy counseling, publishes crisis pregnancy literature and promotes alternatives to abortion. NCRL has no shareholders and none of its earnings inure to the benefit of any individual. Plaintiff Christine Beaumont is an eligible voter in North Carolina. Loretta Thompson is Vice President of NCRL. Stacy Thompson is a member of NCRL's Board of Directors, and Barbara Holt is President of NCRL.

Appendix at 2a-3a.

The Fourth Circuit noted this Court's description of Massachusetts Citizens for Life ("MCFL") in *MCFL*, 479 U.S. at 242, and declared that NCRL was just like MCFL:

> The Court in *MCFL* emphasized that MCFL had accepted voluntary donations from members; engaged in fundraising activities such as garage sales, bake sales, dances, raffles, and picnics; organized a public prayer service; sponsored a regional conference; provided speakers for discussion groups, debates, lectures, and media programs; sponsored an annual march; drafted and submitted legislation; urged its members to contact their elected representatives to express their views on legislative proposals; and published a newsletter. [citation] Similarly, NCRL engages in these same kinds of endeavors. The group is funded overwhelmingly by private contributions from individuals, and has organized such traditional fundraising activities as bake sales, walkathons, and raffles. In addition, NCRL publishes a newsletter, candidate surveys, and voter guides. It also holds conventions, provides counseling and referrals, and publicizes and promotes numerous service groups.

Appendix at 7a.

The Fourth Circuit noted that, although NCRL accepts contributions from business corporations, they are de minimis and much of the corporate contribution comes from donations from a long-distance phone company that solicits customers on the basis that a portion of their payment for long-distance

services will be contributed to a charity designated by the customer:

> Unlike MCFL, NCRL did not have a policy against accepting corporate contributions. However, NCRL was funded overwhelmingly by private, individual donations. While NCRL had accepted some corporate donations in the past, these donations made up only between zero and eight percent of NCRL's total revenues. [citation] We concluded that "this modest percentage of revenue" did not disqualify NCRL for the *MCFL* exemption. [citation] In addition, many of those corporate contributions were not part of the traditional form because they were "part of a program by which phone company customers may direct their phone bill refunds to a nonprofit of their choice." [citation]

Appendix at 21a.

Therefore, as the Fourth Circuit held, NCRL falls within the *MCFL*-exception this Court recognized for corporations wanting to make independent expenditures:

> What the Court said of the nonprofit corporation at issue in *MCFL* applies with equal force to NCRL. Applying *MCFL* in *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999) (*"NCRL I"*), we found that the small amount of corporate contributions NCRL received did not result in its "serving as a conduit 'for the type of direct spending [by for-profit corporations] that creates a threat to the political marketplace.' *MCFL*, 479 U.S. at 264 . . . ." *NCRL I*, 168 F.3d at 714. We therefore held that "NCRL falls squarely within the *MCFL* exception." *Id.*

Appendix at 6a, n.2.

As may be seen from these facts about NCRL, there is no factual basis for characterizing NCRL as having the "primary purpose" of "engag[ing] in political advocacy." *Petition* at I. "Political" means, inter alia, "of or pertaining to exercise of rights and privileges or the influence by which individuals of a state seek to determine or control its public policy." *Black's Law Dictionary* 1042-43 (5th ed. 1979). While activities such as lobbying might be considered "political" under standard English use of the term, NCRL's educational activities, prayer services, and crisis pregnancy services would not. Given that there is no clearly defined scope for "political" in the Solicitor General's *Petition*, and given that there is no quantification in the record of NCRL's activities that would allow such identification of a "primary purpose," it is factually inaccurate to so characterize NCRL's "primary purpose."

It is true that this Court in *MCFL* contrasted corporations "formed to disseminate political ideas" with those formed "to amass capital." *MCFL*, 479 U.S. at 259. But while groups such as MCFL and NCRL may be formed in part to "disseminate political ideas," it does not follow that their "primary purpose

is to engage in political advocacy." *Petition* at I. The Fourth Circuit correctly characterized the "central energizing principle" of groups such as MCFL and NCRL as "unabashedly political *and* expressive." *Appendix* at 6a (emphasis added).

Of course, the problem with characterizing NCRL as having the "primary purpose" of "political advocacy" is that this Court in *MCFL* used quite similar language in describing entities that were outside the exemption for MCFL-type organizations and were instead rightly considered a political committee. This court declared that "should MCFL's independent spending become so extensive that the organization's *major purpose* may be regarded as *campaign activity*, the corporation would be classified as a political committee. See *Buckley*[*v. Valeo*], 424 U.S. 1[,] 79 [(1976)]." *MCFL*, 479 U.S. at 262 (emphasis added). In *Buckley*, this Court identified as a "political committee" any entity "under the control of a candidate or the *major purpose* of which is the *nomination or election of a candidate*." 424 U.S. at 79 (emphasis added). In its analysis, the *MCFL* Court used other similar terminology regarding, speaking of "organizations whose *major purpose* is not *campaign advocacy*, but who occasionally make independent expenditures on behalf of candidates," 479 U.S. at 252-53 (emphasis added), or whose "*major purpose* is to *further the election of candidates*." *Id.* at 253 (emphasis added).

By mischaracterizing NCRL as a corporation whose "primary purpose" is "political advocacy," *Petition* at I, the Solicitor General evokes the language of *MCFL* about corporations that are really political committees because their "major purpose" is "campaign advocacy." NCRL strongly objects to this characterization because it is factually baseless, legally

confusing, and prejudicial--and because NCRL was properly found by the lower courts to be an authentic MCFL-type corporation.

Reasons for Denying the Writ

This Court should deny a writ of certiorari because (a) the FEC did not seek a writ of certiorari, (b) there is no true circuit split, and (c) the lower court's decision was correct under the expressive association cases.

I. The FEC Did Not Seek Certiorari, Raising Deference and Jurisdictional Issues.

A. Given the FEC's Exclusive Authority, Deference Should be Afforded Its Decision Not to Seek Review.

The FEC is the independent federal agency created and charged by Congress to "administer, seek to obtain compliance with, and formulate policy with respect to [the Federal Election Campaign Act of 1971 ("FECA")] and chapter 95 and chapter 96 of title 26." 2 U.S.C. § 437c(b)(1). The FEC has "exclusive jurisdiction with respect to the civil enforcement of such provisions." *Id.* In some contexts, the FEC even has authority to petition for a writ of certiorari without seeking authorization from the Solicitor General. 26 U.S.C. §§ 9010(d) & 9040(d); *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 91 (1994) ("*NRA*"). These powers are unusual for a federal agency, indicating the judgment of Congress that administering, enforcing, and formulating policy concerning the federal election laws requires special expertise and authority.

Based on this special expertise and employing this special authority, the FEC decided not to pursue review of the Fourth Circuit's decision in this case. The FEC had sought review of the district court's decision, which was affirmed by the Fourth Circuit, and the FEC had sought a rehearing en banc. *Appendix* at 61a-62a. But exercising its congressionally-mandated administrative, enforcement, and policy-making authority over the statute at issue in this case (2 U.S.C. § 441b) and over the FEC's own regulations (11 C.F.R. §§ 114.2(b) & 114.10), the FEC decided not to seek review of the Fourth Circuit's decision in this case. The Solicitor General concedes that "[t]he FEC did not request the Solicitor General to seek certiorari on its behalf in this case." *Petition* at 1, n.1.

It may be that the FEC viewed the decision below as convincing. Perhaps the FEC intends to promulgate new regulations that will remove the offending regulatory language and provide a constitutionally permissible interpretation of the challenged statute. But these are decisions within the purview of the FEC, not the Solicitor General. The Solicitor General cites no statute or regulation granting him administrative, enforcement, and policy-making authority over provisions of the FECA--and certainly he has no such authority over the FEC's own regulations.

Given the grant of exclusive administrative, enforcement, and policy-making authority over both the FECA and FEC regulations to the FEC, the Agency's decision not to pursue a writ of certiorari in this case should be afforded deference and the present *Petition* should be denied. And as seen next, the exclusive grant of authority and the FEC's exercise of it to not

seek certiorari review actually removes the authority of the Solicitor General to file the present *Petition*.

B. The Solicitor General Lacks Authority to Seek Review.

As set out in the Counterstatement Concerning Jurisdiction, *supra* at 1, this Court lacks jurisdiction to consider this certiorari petition because the Solicitor General was not authorized to file the petition where (a) the Federal Election Commission decided not to petition, (b) there is no representation that the Solicitor General consulted with the FEC concerning the petition as required by the authorizing regulation, and (c) the authorizing regulation grants the Solicitor General the authority to "*[d]etermine whether*" to take *appeals* but only grants him authority to "*conduct*" cases taken to the Court on *certiorari petition*. 28 C.F.R. § 0.20 (emphasis added).

This Court decided in *NRA*, 513 U.S. at 99, "that the FEC may not independently file a petition for certiorari in this Court under 2 U.S.C. § 437d(a)(6)," without the Solicitor General's authorization. However, *NRA* leaves open the question of whether the Solicitor General may file a petition for certiorari in the present circumstances.[2] Applying the same technical language analysis employed in *NRA* reveals that the Solicitor General's current *Petition* is similarly unauthorized.

---

[2] *Cf. NRA*, 513 U.S. at 97 (citing cases for holding that past practice does not govern where lack of authority to petition for certiorari has not been raised).

Under 28 U.S.C. § 518(a), the Attorney General has delegated the following authority to the Solicitor General by regulation:

> The following-described matters are assigned to, and shall be conducted, handled, or supervised by, the Solicitor General, *in consultation with* each agency or official concerned:
>
> (a) *Conducting*, or assigning and supervising, all Supreme Court cases, including appeals, *petitions for and in opposition to certiorari*, briefs and arguments, and, in accordance with Sec. 0.163, settlement thereof.
>
> (b) *Determining whether*, and to what extent, appeals will be taken by the Government to all appellate courts (including petitions for rehearing en banc and petitions to such courts for the issuance of extraordinary writs) and, in accordance with Sec. 0.163, advising on the approval of settlements of cases in which he had determined that an appeal would be taken.
>
> (c) *Determining whether* a brief amicus curiae will be filed by the Government, or whether the Government will intervene, in any appellate court.

28 C.F.R. § 0.20 (emphasis added).

This regulation requires the Solicitor General to act *in consultation with* the FEC on whether to seek certiorari review. There is no representation by the Solicitor General that any consultation took place. The FEC did not ask the Solicitor General to authorize or file the present *Petition*, as he concedes. *Petition* at 1, n.1. Given the FEC's exclusive authority to administer, enforce, and formulate policy with respect to the FECA and its own regulations, the Solicitor General's failure to consult with the FEC and obtain its consent to the filing of the present *Petition* constitutes a lack of authority to file it. While *NRA* holds that the FEC may not independently seek certiorari review in these circumstances, the governing regulation mandates that neither may the Solicitor General. The law envisions mutual consent before filing a petition is authorized.

The statutory grant of administrative, enforcement, and policy-formulation authority to the FEC and the "in consultation with" language of the governing regulation of themselves establish the necessity of mutual consent before the present *Petition* could be authorized. But other language of 28 C.F.R. § 0.20 also supports the mutual-consent requirement.

While the Solicitor General is granted authority to *determine whether* to take an appeal or to file an amicus curiae brief, 28 C.F.R. § 0.20(b) & (c), the authority to "determin[e] whether" to file a certiorari petition is not granted to him. Rather, he is given authority to *conduct* a certiorari petition. 28 C.F.R. § 0.20(a). The Solicitor General will doubtless assert that "conduct" encompasses "determine whether," but this Court in *NRA* rejected such an imprecise approach.

In *NRA*, the FEC argued that it had authority to take an "appeal" and that "appeal" should be considered in its broad sense as encompassing a certiorari petition. *NRA*, 513 U.S. at 93-94. This Court held that "appeal" could not be given such a broad reading where other authorizing provisions specifically referred to "certiorari review." *Id.* at 94. This Court cited *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) for the transferrable concept that "[w]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *NRA*, 513 U.S. at 95) (omitting internal quotation marks and citation).

Therefore, under this Court's analytical approach in *NRA*, the Solicitor General is not authorized by 28 C.F.R. § 0.20(a) to *decide whether* to petition for certiorari review without FEC agreement and the certiorari petition should be denied.[3]

This makes good policy sense because the Solicitor General in his general overview position cannot possibly have the same grasp of the nuances, intricacies, and policy considerations concerning federal election law as has the FEC, governed by commissioners and assisted by staff with broad and long experience in the field. It is for this reason that deference is commonly afforded federal agencies in matters relating to their area of expertise, and such deference is particularly appropriate in regard to election law and the decision whether

[3] *Cf. NRA*, 513 U.S. at 97 (citing cases for holding that past practice does not govern where lack of authority to petition for certiorari has not been raised).

to seek certiorari review of a case in which the FEC has been a defendant/appellant since January 3, 2000.

II. There Is No True Circuit Split.

The Solicitor General argues that there is a split in the circuits. *Petition* at 12. However, there is no split that affects the federal statute and regulations at issue (2 U.S.C. § 441b; 11 C.F.R. §§ 114.2(b) & 114.10). The Solicitor General concedes, as he must, that *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637 (6th Cir. 1997), involves a state statute. *Petition* at 13. Beside the fact that the two cases do not deal with the "same . . . matter," because both do not involve the same federal statute and regulations, any perceived conflict in analysis does not rise to the level of being "the same *important* matter," as shown below. Rule 10(a) (emphasis added).

III. The Lower Court's Decision Was Correct Under the Expressive Association Cases.

The Solicitor General concludes his *Petition* (at 15) with the comment that "guidance is needed from this Court." But this Court has already given guidance in the expressive association line of cases, which includes *MCFL* (although that case did not use the term). The Fourth Circuit and district court opinions in the *Appendix* ably demonstrate the inexorable logic of this Court's opinion in *MCFL*, 479 U.S. 238, as applied to the present question before the Court, so the whole argument need not be reiterated in this opposition brief. However, certain key points bear highlighting.

The Solicitor General's representation that the Fourth Circuit's decision below conflicts with this Court's decision in

FEC v. National Right to Work Comm., 459 U.S. 197 (1982) ("*NRWC*") is erroneous. In *NRWC*, this Court held that the "members" whom a corporation could solicit for PAC contributions under § 441b did not include "the 267,000 individuals solicited by NRWC during 1976." 459 U.S. at 205. This was so, this Court decided, because these alleged "members" "play no part" in administration, elect no officials, exercised no "control over expenditure of their contributions," and were "explicitly disclaimed" as existing in the "articles of incorporation and other publicly filed documents." *Id.* at 206. Consequently, this Court held that "those solicited were insufficiently attached to the corporate structure of NRWC to qualify as 'members' under the statutory proviso." *Id.*

Reviewing the actual holding of this Court in *NRWC* raises the immediate question of how there could be a conflict between that decision and the one of the Fourth Circuit presently being offered for certiorari review. Nowhere did this Court discuss the issue of whether an MCFL-type organization could be prohibited from making contributions (or even independent expenditures). That issue not being addressed, it plainly was not decided.

NRWC did contain commentary to the effect that § 441b "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 209-10. And it did speak of corporations "without great financial resources, as well as those more fortunately situated," *id.* at 210, but that commentary did not address the nature of the corporation.

But assuming *arguendo* that, because NRWC was a nonprofit, *NRWC* stands for the proposition that § 441b properly extends to nonprofit corporations, the present Fourth Circuit opinion does not conflict with it because the decision does not say that *nonprofits* are constitutionally exempt from the corporate contribution ban. The opinion below only holds that *certain* nonprofits--those like MCFL--must be exempted from the contribution ban because they "do[] not pose the danger that has prompted regulation." *MCFL*, 479 U.S. at 265.

Before this Court in *MCFL* was the issue of whether § 441b could be applied to *independent expenditures* by an MCFL-type corporation. *MCFL*, 479 U.S. at 241. *MCFL* did not decide the present issue--whether MCFL-type organizations must also be exempted from the *contribution* ban--because contributions were not at issue in that case. It is true that this Court in *MCFL* distinguished *NRWC* on the handy point that *NRWC* had dealt with contributions, while *MCFL* dealt with independent expenditures, 479 U.S. at 259.[4] But that was not the holding of this Court, because the issue presented by the

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[4] *MCFL* also focused on the fact that in *NRWC* the solicitations at issue were for contributions "to a *political committee*," "established for the purpose of making direct contributions to political candidates." *MCFL*, 479 U.S. at 259-60 (citing *NCRL*, 459 U.S. at 200) (emphasis added). The complaint filed with the FEC that gave rise to the *NRWC* case was filed against a *political committee* created by NRWC. *NRWC*, 459 U.S. at 200. Thus, even if *NRWC* is supposed to stand for the proposition that an entity like the one at issue in that case may be regulated as to contributions, NCRL is not a political committee.

present case was not before the Court.[5] When this case squarely presented the corporate contribution issue, the Fourth Circuit properly looked to the analysis of this Court in *MCFL* and held that the logic of *MCFL* requires an exemption from the corporate contribution ban for MCFL-type organizations.

The analytical key in *MCFL*, which the Fourth Circuit recognized, is to examine the nature of the corporation to determine whether it poses any threat of corruption to the political system--whether it should be a prohibited source of *any* type of financial participation in the federal political process because the participation of *this* type of organization would have an adverse effect. Because an MCFL-type corporation poses absolutely none of the "danger of corruption" to the political system that business corporations pose, *MCFL*, 479 U.S. at 259, there is no justification for barring it from either independent expenditures or contributions to candidates.

Consequently, any distinction between independent expenditures and contributions is irrelevant, except that limitations on contributions can be constitutionally justified. But exempting NCRL from the contribution ban does not exempt if from the contribution limit. Any contribution NCRL would make is subject to federal contribution limits.

For the Solicitor General and others who do not recognize the *MCFL* analytical key, the critical factor is simple incorporation. According to them, if an association is incorporated, that is controlling. It can't make contributions. But, of course, that

[5] "This Court is bound by holdings, not language." *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001).

is too simplistic. A political action committee may be incorporated for the liability advantages, and it clearly may make contributions to candidates. 11 C.F.R. § 114.12. So the mere fact of incorporation cannot be the analytical key. It must be the nature of the organization.

Many expressive associations incorporate for the same reason that PACs do. They want the protections from potential liability that the corporate form offers. They don't incorporate to shield income from personal income taxation and thereby amass capital. Historically, this has been an advantage of the corporate form because the corporate income tax was much lower than the personal income tax. So using the corporate form permitted faster accumulation of money and, as a consequence, using such funds for political purposes was considered unfair and corrupting to the political system. This Court held that such potential justified banning corporate contributions. But nonprofit associations don't incorporate for this reason. As nonprofit entities, they already pay no tax. So they incorporate for liability reasons, not to amass money. Consequently, the notion that the corporate form per se is corrupting is simply incorrect with respect to MCFL-type corporations, which this Court in *MCFL* found to pose no threat of corruption at all to the political system. *MCFL*, 479 U.S. at 259.

This Court in *MCFL* went one step further. Even if an MCFL-type corporation accumulates funds using the corporate form, it raised the funds on the basis of its "popularity in the political marketplace," not its business "success in the economic marketplace." This Court succinctly dismissed the corporate-form-per-se argument:

> Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. [footnote] Groups such as MCFL, however, do not pose that danger of corruption."

Id.

Consequently, this Court's analytical key with regard to regulating expressive associations is to carefully examine the nature of the organization and evaluate the interests asserted, not to employ per-se analysis based on technical form. Because NCRL is clearly an expressive association within the line of this Court's decisions such as *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) ("*BSA*"), strict scrutiny must be applied in reviewing the corporate contribution ban if the ban "impairs" "expressive activity" in which BCRA "engages." *BSA*, 530 U.S. at 655; *cf. id.* at 657-58. The corporate contribution ban clearly burdens a form of expression in which NCRL would like to engage.

Therefore, the government must demonstrate that its restriction is narrowly tailored to a compelling interest in barring NCRL from making a contribution with general funds. *Id.* at 658; *MCFL*, 479 U.S. at 256. A blanket ban on corporate contributions because of their per-se form addresses neither the compelling interest nor the narrow tailoring requirement of First Amendment heightened scrutiny. And because this Court

has declared that an MCFL-type corporation poses absolutely none of the "danger of corruption" to the political system that business corporations pose, *MCFL*, 479 U.S. at 259, there is no justification for barring it from contributing to candidates.

As this Court noted in *MCFL*, "[i]t may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake." *MCFL*, 479 U.S. at 264. Not only is the class of MCFL-type organizations small, but the case below was decided only as-applied to NCRL, a small organization, despite a specific request by NCRL for facial invalidation of the statute and regulations at issue. *Appendix* at 30a. Consequently, this case does not even involve a concern of systemic political corruption by the aggregation of many contributions from MCFL-type corporations. That issue, should it ever arise, is not ripe in this case and should await another day, if ever. The issue is theoretical and unlikely to develop because expressive associations are generally small[6] and do not have extra money lying around from their bake sales to make large or many contributions.

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[6]This Court in *MCFL* took special note of the burdens on *small* organizations of maintaining a PAC and declared it an inadequate substitute for an MCFL-type corporation using general funds to make independent expenditures because PAC compliance "impose[s] administrative costs that many *small* entities may be unable to bear. [footnote] Furthermore, such duties require a far more complex and formalized structure than many *small* groups could manage. Restriction of solicitation of contributions to 'members' vastly reduces the sources of funding for organizations with either *few or no formal members* . . . ." 479 U.S. at 254-55 (emphasis added).

This Court addressed similar concerns in *MCFL* with respect to independent expenditures and dismissed them. The FEC had maintained that exempting MCFL-type organizations from the independent expenditure ban "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions." 479 U.S. at 262. This Court responded: "We see no such danger." *Id.* And there is no evidence that such a problem has developed. Consequently, there need be no such concern now.

As this Court said in *MCFL*, if contributions become the "major purpose" of an MCFL-type organization then it rightly must register and report as a political action committee, *Id.* at 262. This Court continued:

> Even if § 441b is inapplicable, independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, and will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent spending activity and its receipt of

> contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.

Id.

The same principles apply to contributions. No legitimate concern over "massive undisclosed political spending," *id.*, is presented by this case. Consequently, as the Fourth Circuit declared, this case represents a "step [that is] cautious and modest." *Appendix* at 34a.

Finally, the Solicitor General argues the "need for uniform campaign financing rules governing federal elections across the country." *Petition* at 15. He ignores the fact that the decision and injunction below were as-applied only to NCRL, and the Fourth Circuit expressly rejected the facial challenge. *Appendix* at 30a. The fact that NCRL will be able to make contributions because § 441b is unconstitutional as applied to it while other MCFL-type organizations may not, does not raise the sort of important issue that warrants the expenditure of the limited resources of this Court. Even if there are other organizations in the Fourth Circuit like NCRL that are able to obtain similar as-applied injunctions because of the decision below, this raises no momentous issue for the reasons this Court stated in *MCFL*, cited above. *Supra* at 19-20. And even if NCRL-type organizations in the Fourth Circuit can obtain similar relief from the burdens of § 441b while similar organizations in other circuits cannot, that is not a matter worthy of this Court's attention at this time. As Justice Stevens has stated:

> the existence of differing rules of law in different sections of our great country is not always an intolerable evil .... It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982).

CONCLUSION

For the foregoing reasons, the Solicitor General's *Petition* should be denied.

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NOV 1 2002

No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 02-403

FEDERAL ELECTION COMMISSION, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The divided court of appeals' decision in this case holds unconstitutional an important provision of the Federal Election Campaign Act of 1971 (FECA) as applied to a common type of nonprofit advocacy group. Respondents have provided no reason why this Court should not review that decision.

A. The Decision Below Is Inconsistent With This Court's Decisions

As explained in the petition (at 9-10), the court of appeals' decision in this case is difficult to square with this Court's decision in *Federal Election Commission* v. *National Right to Work Campaign*, 459 U.S. 197 (1982) (*NRWC*), and with the Court's discussion of *NRWC* in *Federal Election Commission* v. *Massachu-*

setts Citizens for Life, Inc., 479 U.S. 238 (1986) (*MCFL*). Indeed, Judge Gregory concluded in his dissent that there is no way to "escape the conclusion that *NRWC* is dispositive [in this case] with respect to § 441b's ban on corporate contributions." Pet. App. 40a.

Respondents contend that *NRWC* held only "that the 'members' whom a corporation could solicit for PAC contributions under § 441b did not include [certain individuals]." Br. in Opp. 14. But, as explained in the petition (at 9-10), that reading of *NRWC* fails to take into account the Court's extended consideration in *NRWC* of the broader "statutory prohibitions" on direct corporate campaign contributions. 459 U.S. at 208; see *id.* at 207-209. As Judge Gregory stated, although "*NRWC* dealt with the definition of 'members' for § 441b segregated fund solicitations purposes, * * * the *NRWC* Court's discussion of the exception cannot be so easily divorced from its discussion of the general rule." Pet. App. 38a. Indeed, as Judge Gregory concluded, "the Court's analysis [in *NRWC*] of the exception was largely determined by the need to give broad prophylactic effect to the ban on corporate contributions." *Ibid.*

Respondents' reading of *NRWC* also is at odds with this Court's own treatment of *NRWC*. For example, in *Federal Election Commission* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985), the Court observed that *NRWC* "rightly concluded that Congress might include, along with labor unions and corporations *traditionally prohibited from making contributions to political candidates*, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." *Id.* at 500 (emphasis added). So too, in *MCFL* the Court specifically distinguished *NRWC* not because the case involved the definition of "members" for purposes of Section 441b, but because "the political activity at issue in [*NRWC*] was contributions," rather than (as in *MCFL*) independent expenditures. 479 U.S. at 259; see Pet. 10-11.

Respondents argue that "any distinction between independent expenditures and contributions is irrelevant, except that *limitations* [as opposed to bans] on contributions can be constitutionally justified," and that because *MCFL* invalidated a *ban* on independent expenditures as applied to certain nonprofit advocacy groups, a *ban* on campaign contributions is unconstitutional as applied to such corporations as well. Br. in Opp. 16 (emphasis added). But that argument fails to account for this Court's repeated statements that independent expenditures and campaign contributions are constitutionally different, and that, under the First Amendment, campaign contributions may be subjected to greater restrictions, including in appropriate circumstances a ban, than independent expenditures. See, *e.g.*, *Federal Election Commission* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (affirming that the Court's "cases have respected th[e] line between contributing and spending"); Pet. 11 (citing cases). Indeed, the Court in *MCFL* specifically emphasized the constitutional distinction between regulation of independent expenditures and campaign contributions in explaining the different outcomes in *NRWC* and *MCFL*. See 479 U.S. at 259-260, 261-262; Pet. 10-11.

Respondents argue that the decision below does not conflict with *NRWC* because it holds only that Section 441b is invalid as applied to the nonprofit corporation in this case (*i.e.*, North Carolina Right to Life, Inc.

(NCRL)), and not as applied to all nonprofit corporations. Br. in Opp. 15. But respondents' position is that NCRL is "an authentic MCFL-type corporation," *id.* at 7, and, as the dissent in *MCFL* recognized, the nonprofit corporation in *MCFL* was analogous to the one in *NRWC*. See 479 U.S. at 269 ("The corporation whose fund was at issue [in *NRWC*] was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance.") (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).[1]

B. The Decision Below Creates A Circuit Conflict

Respondents devote only a paragraph to the circuit conflict created by the decision below and *Kentucky Right to Life, Inc.* v. *Terry*, 108 F.3d 637 (6th Cir.), cert. denied, 522 U.S. 860 (1997), and note simply that *Kentucky Right to Life* "involve[d] a state statute." Br. in Opp. 13. It is of course true that *Kentucky Right to Life* involved a challenge to a state law "prohibit[ing] nonprofit corporations from making direct contributions to candidates for political office." *Id.* at 645. But, as explained in the petition (at 12-13), the state prohibition in that case is directly analogous to the federal prohibition at issue here. Moreover, in upholding the state law in *Kentucky Right to Life*, the Sixth Circuit concluded that "the reasoning of *NRWC* applie[d] directly" to such a prohibition. 108 F.3d at 646; see *ibid.* ("Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the * * * restrictions [in this case]."). Accordingly, as Judge Gregory recognized in his dissent, the decision below creates a conflict in the circuits over whether the type of prohibition at issue is constitutional. See Pet. App. 35a.

[1] Respondents "strongly object" to the statement in the petition that NCRL has "the 'primary purpose' of 'engaging in political advocacy.'" Br. in Opp. i n.1; see *id.* at 2-7. But respondents themselves state that "the Fourth Circuit correctly characterized the 'central energizing principle' of groups such as MCFL and NCRL as 'unabashedly political *and* expressive.'" Br. in Opp. 6 (quoting Pet. App. 6a (emphasis added by respondents)). In addition, respondents have argued throughout this litigation that NCRL is "just like" (Br. in Opp. 4) the nonprofit corporation in *MCFL*, *i.e.*, an organization "formed for the express purpose of promoting political ideas." *MCFL*, 479 U.S. at 264. And of course, respondents brought this action to seek relief from federal limitations on campaign contributions and expenditures. In any event, although NCRL does not qualify under the FEC's regulations for the exception recognized in *MCFL*, the FEC does not challenge for purposes of the petition for certiorari in this case the court of appeals' conclusion that NCRL is a "*MCFL*-type corporation." Pet. App. 34a. Rather, the FEC challenges the court of appeals' conclusion that Section 441b's prohibition on campaign contributions is unconstitutional as applied to such a corporation. See Pet. i.

C. There Is No Jurisdictional Impediment To Granting Certiorari

Respondents argue that jurisdiction is lacking on the ground that "the Solicitor General was not authorized to file the petition" by the FEC. Br. in Opp. 1; see *id.* at 7-13. That is incorrect. As this Court specifically recognized in *Federal Election Commission* v. *NRA Political Victory Fund*, 513 U.S. 88 (1994), Congress has authorized the Solicitor General "to conduct and argue the Federal Government's litigation in the Supreme Court," including litigation such as this on behalf of the FEC. *Id.* at 96 (citing 28 U.S.C. 518(a)); see *id.* at 93 (noting "Solicitor General's traditional role in

conducting and controlling all Supreme Court litigation on behalf of the United States and its agencies—a role that is critical to the proper management of Government litigation brought before this Court").

The Solicitor General's settled authority "to conduct" litigation on behalf of the Federal Government (and its agencies and officers) before the Supreme Court includes the authority to determine whether to seek review of a lower court decision. See *NRA Political Victory Fund*, 513 U.S. at 96 ("Whether review of a decision adverse to the Government in a court of appeals should be sought depends on a number of factors which do not lend themselves to easy categorization. The Government as a whole is apt to fare better if these decisions are concentrated in a single official."); *United States* v. *Providence Journal Co.*, 485 U.S. 693, 706 (1988) (describing the virtues of "centralization of the decision whether to seek certiorari" on behalf of the government); 28 C.F.R. 0.20(a) (The Solicitor General is responsible for "[c]onducting, or assigning and supervising, all Supreme Court cases, including appeals, petitions for and in opposition to certiorari, briefs and arguments, and * * * settlement thereof.").

In *NRA Political Victory Fund*, the Court held that, "[b]ecause the FEC lacks statutory authority to litigate this case in this Court, it necessarily follows that the FEC cannot independently file a petition for certiorari, but must receive the Solicitor General's authorization." 513 U.S. at 98. So too, when a federal agency like the FEC determines not to recommend that the Solicitor General seek certiorari on its behalf, the Solicitor General retains the authority to petition for certiorari on behalf of the agency when, as here, the agency lacks independent litigating authority in this Court. That is especially true when a decision invalidates, or calls into

question, the constitutionality of an important federal statute. Cf. 28 U.S.C. 2403(a) (allowing the United States to intervene to defend the constitutionality of an Act of Congress in any litigation in federal court in which the United States or a federal agency is not a party).[2]

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2002

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[2] In a similar vein, respondents argue that the Solicitor General may not file a petition for certiorari without consulting with the FEC, and that jurisdiction is lacking in this case because "[t]here is no representation by the Solicitor General that any consultation took place." Br. in Opp. 11. The regulation relied upon by respondents states that the Solicitor General should conduct litigation "in consultation with each agency or official concerned." 20 C.F.R. 0.20. But there is no requirement, much less any requirement affecting the jurisdiction of this Court, that the Solicitor General state in a petition for certiorari (or other brief) that such consultation took place, and no basis for presuming that the Solicitor General has not complied with any statutory or regulatory duty when such a representation is not made in a petition.

Supreme Court, U.S.
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No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: OCT. 17, 2002
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Court of Appeals Docket Nos. 01-1348 and 01-1479

CHRISTINE BEAUMONT, ET AL.,
PLAINTIFFS-APPELLEES

v.

FEDERAL ELECTION COMMISSION,
DEFENDANT-APPELLANT

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
1/25/02		Published, authored opinion filed with dissent. [01-1348, 01-1479] (bhr) [01-1348 01-1479]
1/25/02		Judgment order filed. Decision: affirmed. EOD Date: 1/25/02. [01-1348, 01-1479] (bhr) [01-1348 01-1479]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
5/16/02		COURT ORDER filed [3588452] denying motion for rehearing [3550827-1] EOD Date: 5/16/02. In 01-1348, 01-1479, denying motion for rehearing en banc [3550827-2] EOD Date: 5/16/02. in 01-1348, 01-1479 Copies to all counsel. [01-1348, 01-1479] (bhr) [01-1348 01-1479]

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

Civil Docket No. 00-CV-2

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/3/00	1	Verified Complaint filed re: campaign contributions in federal elections/to federal candidates. w/attach. (js)
3/3/00	7	Motion by Christine Beaumont, Loretta Thompson Stacy Thompson, Barbara Holt, North Carolina Rights for summary judgment ORAL ARGUMENT REQUESTED. (js) [Entry date 03/05/00]

DATE	DOCKET NUMBER	PROCEEDINGS
3/17/00	9	Motion by Federal Election to dismiss pltfs.' complaint in part, for partial summary judgment (js) [Entry date 03/18/00]
10/4/00	14	Order denying [9-1] motion to dismiss pltfs.' complaint in part, denying [9-2] motion for partial summary judgment, granting [7-1] motion for summary judgment signed by Terrence W. Boyle, USDJ. The effect of this ruling is STAYED until the final order has been issued by the Court. The Court will award appropriate declaratory and injunctive relief at that time. OB Ref: BO # 16, p. 58; served 10/30/00 via fax on 10/300 and via U.S. Mail on 10/4/00. (sat)
10/26/00	19	Order granting [16-1] motion for temporary restraining order signed by Terrence W. Boyle,

DATE	DOCKET NUMBER	PROCEEDINGS
		USDJ. Pending a final order of the Court, Defendants are hereby ENJOINED from relying on, enforcing or prosecuting violations of the sections 2 U.S.C. Section 441(b) and 11 C.F.R. Sections 114.2(b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provisions. OB Ref: BO #16, p. 106; served via fax. (sat)
1/24/01	23	Order signed by Terrence W. Boyle, USDJ. Defendants are permanently ENJOINED from relying on, enforcing or prosecuting violations of sections 2 U.S.C. Section 441(b) and 11 C.F.R. Sections 114.2(b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any

DATE	DOCKET NUMBER	PROCEEDINGS
		other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provision. OB Ref: BO # 16, p. 233; served. (sat)
1/24/01	24	Judgment for North Carolina Right, Barbara Holt, Stacy Thompson, Loretta Thompson, Christine Beaumont against Federal Election signed by Sue A. Towe, Deputy Clerk. Defendants are permanently ENJOINED from relying on, enforcing or prosecuting violations of sections 2 U.S.C. Section 441(b) and 11 C.F.R. Sections 114.2 (b) and 114.10 as against Plaintiffs, and from relying on, enforcing or prosecuting violations of any other statutory provision whose obligations and restrictions reasonably flow from the aforementioned provisions. Served. OB Ref: BO # 16, p. 235 (sat)
3/6/01	26	Notice of appeal by Federal Election (rp) [Entry date 03/08/01]

DATE	DOCKET NUMBER	PROCEEDINGS
3/16/01	27	Notice of cross-appeal by North Carolina Right. Barbara Holt, Stacy Thompson, Loretta Thompson, Christine Beaumont (rp) [Entry date 03/27/01]

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

Case Number: 2:00-CV-2-BO(2)

CHRISTINE BEAUMONT, ET AL.

v.

FEDERAL ELECTION COMMISSION, DEFENDANT

[Filed: Jan. 10, 2000]

SUMMONS IN A CIVIL ACTION

TO: (Name and Address of Defendant)
Lawrence Nobel
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

Plaintiff's Attorney (Name and address)

Paul Stam, Jr.
Stam, Fordham & Danchi, P.A.
106 Holleman Street
P.O. Box 1600
Apex NC 27502-1600

James Bopp, Jr.
James R. Mason, III
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510

an answer to the complaint which is herewith served upon you, within sixty (60) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

/s/ DAVID DANIEL — 1-8-00
CLERK — DATE

/s/ REBECCA BOWEN
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

Case Number: 2:00-CV-2-BO(2)

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT AND NORTH CAROLINA RIGHT TO LIFE, INC., PLAINTIFFS

v.

FEDERAL ELECTION COMMISSION, DEFENDANTS

[Filed: Jan. 3, 2000]

VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Christine Beaumont, Loretta Thompson, Stacy Thompson, Barbara Holt and North Carolina Right to Life, Inc. ("NCRL"), by counsel and for their Verified Complaint, state the following:

I. Introduction

1. This is a civil action for declaratory and injunctive relief arising under the Constitution of the United States. North Carolina Right to Life, Inc., a non-profit, ideological North Carolina corporation, and its offers and board members, challenge 2 U.S.C. § 441b(a), which bans corporations from making contributions or expenditures in connection with federal elections, and two FEC regulations, 11 C.F.R. § 114.2(b), which prohibits all corporations from making campaign contributions to federal candidates, and 11 C.F.R. § 114.10, which purports to create an exemption allowing certain non-

profit corporations to make independent expenditures, but which exemption is unconstitutionally too narrow, and would not include NCRL. If it were lawful to do so, NCRL would make contributions and independent expenditures in the months preceding the year 2000 federal elections. However, because it would be a crime for it to do so, NCRL will refrain from pursuing its protected First Amendment rights of association and free speech in the absence of the judicial relief it seeks in this complaint.

II. Jurisdiction and Venue

2. This action arises under the Constitution and laws of the United States. This Court has jurisdiction under 28 U.S.C. § 1331 (jurisdiction established for federal constitutional questions), 28 U.S.C. § 2201 (providing for declaratory judgment) and 28 U.S.C. § 2202 (providing for further relief based on declaratory judgment). The authority of this court to declare void, *ultra vires*, and/or unconstitutional actions of the Federal Election Commission is granted by 5 U.S.C. § 706 (Administrative Procedure Act).

3. Venue in this district is proper pursuant to 28 U.S.C. § 1391(e)(4). The defendant is an agency of the United States, and plaintiffs Christine Beaumont, Loretta Thompson and Stacy Thompson reside in the District.

III. Parties

4. Plaintiff Christine Beaumont is an adult citizen of the United States and a resident of North Carolina. She is eligible to vote in any election for President of the United States. Christine Beaumont resides in Shawboro, North Carolina. She is not a member of NCRL.

5. Plaintiff Loretta Thompson is Vice President of NCRL's Board of Directors and is on the Executive Committee of the Board of Directors. She is eligible to vote in any election for President of the United States and resides in Knightdale, North Carolina.

6. Plaintiff Stacy Thompson is a Member of the Board of Directors and is on the Executive Committee of the Board of Directors. He is eligible to vote in any election for President of the United States and resides in Knightdale, North Carolina.

7. Plaintiff Barbara Holt is President of NCRL's Board of Directors and is on the Executive Committee of the Board of Directors. She is eligible to vote in any election for President of the United States and she resides in Elon College, North Carolina.

8. NCRL is a non-profit, ideological corporation, incorporated in the State of North Carolina. NCRL's principle office is in Greensboro, North Carolina.

9. Defendant Federal Election Commission ("Commission" or "FEC") is an agency of the United States of America and is charged with administering and enforcing the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.* ("FECA").

IV. Facts

A. NCRL's Organizational Structure and Purposes

10. NCRL is a non-profit, ideological North Carolina corporation and is exempt from federal income tax under § 501(c)(4) of the Internal Revenue Code (codified at 26 U.S.C.).

11. NCRL was not established by a business corporation or a labor union, and it has no shareholders or

other persons affiliated with it who have a claim on it assets or earnings.

12. NCRL's organizational purposes are set forth in its Articles of Incorporation. They are:

> (1) Being a non-profit, non-sectarian, public service organization dedicated to protecting and fostering the most basic value of our society–life itself; . . . We advocate positive action to improve human life, and oppose whatever is destructive or detrimental to human life at any stage of development, age or condition. We are especially mindful of the unborn, the aged, the impoverished, the impaired, the incompetent, and all those otherwise weak, disadvantaged or defenseless. Our purpose is to gather and disseminate, by all means of communications, accurate up-to-date information on the subjects of abortion, euthanasia, and other life destroying techniques, and their effects on the victim, the family, the community, and on the health care profession and society at large; and to further work for pro-life alternatives to abortion and humane solutions to the problems of women who seek abortions; said alternatives being counseling, organizing and carrying out educational programs; to foster and encourage public health programs; to assist in the placing for adoption children of all races and those with handicaps; to assist in the establishment of a comprehensive medical, social and recreational care program for unwed mothers; and to promote anti-poverty programs through job training and child care centers, specifically directed toward the family unit. (2) To make donations for the public welfare, or for religious, charitable, scientific or educational purposes.

Articles Of Incorporation, attached hereto as Exhibit A.

13. NCRL engages in various charitable activities, such as, referring women involved in crisis pregnancies to organizations that can assist them. NCRL cooperates with, publicizes and promotes numerous service groups that provide alternatives to abortion and post-abortion counseling. NCRL intends to continue to engage in such charitable activities.

14. No part of the net earnings of NCRL inures to the benefit of any private shareholder or individual. Except for reasonable compensation for services rendered to the corporation, NCRL does not afford any pecuniary gains to its members, directors, officers or any other persons. NCRL has no capital stock.

15. NCRL is not affiliated with any political candidate, political party, or campaign committee.

16. It is not NCRL's major purpose to nominate, elect, or defeat federal or state candidates.

B. NCRL's Sources of Revenue

17. NCRL is overwhelmingly funded by private contributions from individuals.

18. NCRL has no policy, written or otherwise, against accepting contributions from business corporations or labor unions.

19. NCRL has accepted contributions from business corporations into its general fund. However, the amount of annual contributions it receives from business corporations is not significant in relation to the total contributions it receives from individuals during the year. For example, such corporate contributions

amounted to 2.44% in 1996, 3.57% in 1997 and 3.63% in 1998.

20. The total corporate contributions listed in paragraph 19, above, were due almost exclusively to income received from Amerivision, Inc., under a program where the long distance company returns 10% of its customers' long distance charges to the not-for-profit corporations its customers designate. Thus, these monies are in reality individual contributions given to NCRL, via Amerivision, as a result of the individuals agreeing with the ideological and political goals of NCRL.

21. In 1996, two corporations made contributions to NCRL. Amerivision accounted for $3,723.15 out of a total of $3,773.15 in contributions from corporations.

22. In 1997, five corporations made contributions to NCRL. Amerivision accounted for $5,262.99 out of a total of $5,537.99 in contributions from corporations.

23. In 1998, eight corporations made contributions to NCRL. Amerivision accounted for $4,061.91 out of a total of $4,296.91 in contributions from corporations.

24. NCRL has not accepted any contributions from labor unions into its general fund.

25. NCRL has engaged in traditional fundraising activities of not-for-profit corporations, such as walk-a-thons and raffles, and engages in minor business activities incidental and related to its advocacy of issues, such as receiving special event revenue from the price of admission to its conventions and revenue from distributing pro-life literature. The annual revenue generated from such activities is negligible in relation to the total revenue NCRL generates each year.

C. NCRL's Use of Its Funds

26. To further its general purposes NCRL has spent money for issue advocacy communications and publications such as its newsletter, candidate surveys and voter guides. It intends to do so in the future.

27. NCRL has made lawful contributions to candidates for state office and has lawfully made independent express advocacy communications advocating the nomination, election or defeat of state candidates. It intends to do so in the future.

28. Making contributions to state candidates and expressly advocating on behalf of state candidates is not now nor will it ever be NCRL's major purpose, either as expressed in its organizational documents or as measured by its disbursements.

29. NCRL has never made contributions to candidates for federal office and it has not made independent expenditures advocating the nomination, election or defeat of candidates for federal office.

30. If it were lawful for it to do so, NCRL would contribute $1,000 or less to at least one federal candidate before the year 2000 general election, and before future federal elections.

31. If it were lawful for it to do so, NCRL would spend more than $250.00 to make at least one independent expenditure advocating the election or defeat of federal candidates before the year 2000 general election and before future elections.

32. NCRL will not make contributions or independent expenditures in connection with federal elections without the consent of its officers or board members.

33. Plaintiffs Loretta Thompson, Stacy Thompson and Barbara Holt would consent to NCRL making contributions and expenditures in connection with federal elections if it were lawful for them to do so.

34. Because it would be unlawful for Plaintiffs Loretta Thompson, Stacy Thompson and Barbara Holt to consent to NCRL's making contributions and independent expenditures in connection with federal elections, they will withhold their consent and NCRL will not make contributions or independent expenditures in connection with federal elections.

35. Plaintiff Christine Beaumont believes in the sanctity of human life, including the sanctity of unborn children. In the past, Plaintiff Christine Beaumont has sought out reliable information about federal candidates and their positions.

36. Plaintiff Christine Beaumont would like to receive independent express advocacy communications regarding federal candidates from NCRL.

37. Making contributions to federal candidates and expressly advocating the election or defeat of federal candidates is not now nor will it ever be NCRL's major purpose, either as expressed in its organizational documents or as measured by its disbursements.

38. It is not now or nor will it ever be NCRL's major purpose to make contributions or expenditures on behalf of state and federal candidates combined.

D. First Amendment Protections Afforded to Non-Profit, Ideological Corporations

39. In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 497 U.S. 238, 263 (1986) ("MCFL"), the Supreme Court held that "corporations that have features more akin to

voluntry political associations than business corporations should not have to bear burdens on independent spending solely because of their incorporated form." The Court then enumerated the particular characteristics of the non-profit ideological corporation in that case, which were dispositive of the Court's determination that the federal government could not restrict the non-profit, ideological corporation's First Amendment rights.

40. In *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 713-715 (4th Cir. 1999) ("NCRL"), the Fourth Circuit of Appeals struck down as facially overbroad, a state statute that prohibited corporate expenditures and contributions for political purposes, because it failed to make an exception for non-profit, ideological corporations.

41. Furthermore, the Fourth Circuit agreed with the Eighth and Second Circuits that the "list of non-profit characteristics in *MCFL* was not a constitutional test for when a non-profit corporation must be exempt, but an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*." *NCRL*, 168 F.3d at 714 (citations and internal quotations omitted).

42. Most significantly, the Fourth Circuit held that the plaintiff nonprofit, ideological corporation in this case, North Carolina Right to Life, Inc., "falls squarely within the *MCFL* exception," *id.*, vis-a-vis a state statutory ban on corporate contributions and expenditures.

43. Neither NCRL's purposes nor its activities have changed in any constitutionally significant way since *NCRL* was decided.

E. <u>Unconstitutional Federal Law Restrictions on NCRL's Ability to Make Contributions and Expenditures</u>

44. According to 2 U.S.C. § 44lb(a): "It is unlawful for . . . *any corporation whatever* . . . to make a contribution or expenditure in connection with any [federal] election." (Emphasis added).

45. According to 11 C.F.R. § 114.2(b): "Any corporation whatever . . . is prohibited from making a contribution as defined in 11 C.F.R. 114.1(a) in connection with any Federal election."

46. According to 11 C.F.R. § 114.10 non-profit corporations can be exempt from the statutory ban on expenditures only if they meet all of the following criteria: (1) the corporation's "*only* express purpose is the promotion of political ideas," 11 C.F.R. § 114.10(c)(1); (2) the corporation "*cannot* engage in business activities," 11 C.F.R. § 114.10(c)(2); (3) the corporation has "[n]o persons who are offered or who receive any benefit that is a disincentive for them to disassociate themselves with the corporation on the basis of a political issue," 11 C.F.R. § 114.10(c)(3)(ii); and (4) the corporation can "demonstrate through accounting records" that it "does not directly or indirectly accept donations or anything of value from business corporations" or that it "has a written policy against accepting donations from business corporations. . . ." 11 C.F.R. § 114.10(c)(4)(ii) and (iii). (Emphasis added).

47. The Eighth Circuit Court of Appeals ruled that the FEC's regulatory attempt to codify the *MCFL* exemption in 11 C.F.R. § 114.10 is facially unconstitutional because it would "deny the *MCFL* exemption to a voluntary political association that conducts minor

business activities or accepts insignificant corporate donations." *Minnesota Concerned Citizens for Life, Inc.* v. *FEC*, 113 F.3d 129, 130 (8th Cir. 1997).

48. Additionally, the Second Circuit Court of Appeals rejected the FEC's narrow interpretation of the *MCFL* exemption and dismissed a pre-regulation enforcement action under § 441b against a non-profit, ideological corporation. "The rigidity with which the FEC would have us apply *MCFL* would impoverish political debate." *FEC* v. *Survival Education Fund, Inc.*, 65 F.3d 285, 292 (2nd Cir. 1995).

F. Threat of Enforcement

49. The Commission has initiated enforcement proceedings against alleged corporate violators of the Act in the past and there is no reason to believe that the Commission would not institute enforcement proceedings against NCRL.

50. Enforcement proceedings against North Carolina Right to Life, Inc. would have the effect of punishing it for the exercise of its rights, privileges and immunities guaranteed by the Constitution and laws of the United States.

51. Although NCRL believes that the challenged statute is unconstitutional and that the challenged regulations are unconstitutional and invalid, the threat of enforcement proceedings has a chilling effect on the First Amendment rights of NCRL, deterring it from fully and vigorously exercising its rights.

52. Additionally, section 441b provides that it is unlawful for "any officer or director of any corporation to consent to any contribution or expenditure by the corporation . . . prohibited by this section." Thus

Plaintiffs Loretta Thompson, Stacy Thompson and Barbara Holt, as officers and directors of the corporation would be personally liable for any violations.

53. The chill on Plaintiff NCRL's speech resulting from the regulation of independent expenditures in turn results in the unconstitutional infringement of Plaintiff Christine Beaumont's right to receive information and ideas from NCRL. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817, 1823 (1976).

54. NCRL is ready, willing, and able to make contributions to federal candidates and make independent expenditures in connection with federal elections before the year 2000 federal elections. NCRL will refrain from doing so, however, because the FEC could seek a civil penalty in an amount equal to the greater of $5,000 per violation, or the dollar value of the violation. 2 U.S.C. § 437g(a)(6)(A). Indeed, the FECA also provides criminal penalties for certain violations. 2 U.S.C. § 437g(d).

55. Immediate and irreparable injury, loss, and damage will result to the Plaintiffs by reason of the statute's and regulations' chilling effect on Plaintiff NCRL's free speech rights.

First Claim for Relief

56. Plaintiffs reallege paragraph 1 through 55.

57. NCRL intends to make contributions of less than $1,000 to federal candidates before the 2000 general election, and before future federal elections.

58. Section 441b of the FECA prohibits all corporations from making contributions in connection with a federal election.

59. Section 441b of the FECA makes no exception for non-profit, ideological corporations.

60. Plaintiffs seek a declaratory judgment that section 441b is overbroad and unconstitutional on its face. *See NCRL*, 168 F.3d at 713.

61. In the alternative, Plaintiffs seek a declaration that section 441b's prohibition of corporate contributions is unconstitutional as applied to NCRL, an *MCFL*-exempt corporation. *See NCRL*, 168 F.3d at 714.

62. Plaintiffs also seek a permanent injunction barring the FEC from enforcing the FECA against NCRL predicated on contributions to federal candidates.

Second Claim for Relief

63. Plaintiffs reallege paragraphs 1 through 55.

64. NCRL intends to make independent expenditures expressly advocating the election or defeat of federal candidates before the 2000 general election, and before future federal elections.

65. Section 441b of the FECA prohibits all corporations from making expenditures in connection with a federal election.

66. Section 441b of the FECA makes no exception for non-profit, ideological corporations.

67. Plaintiffs seek a declaratory judgment that section 441b is overbroad and unconstitutional on its face. *See NCRL*, 168 F.3d at 713.

68. In the alternative, Plaintiffs seek a declaration that section 441b's prohibition of corporate expenditures is unconstitutional as applied to NCRL, an

MCFL-exempt corporation. *See NCRL*, 168 F.3d at 714.

69. Plaintiffs also seek a permanent injunction barring the FEC from enforcing the FECA against Plaintiffs predicated on NCRL's independent expenditures expressly advocating the election or defeat of federal candidates.

Third Claim for Relief

70. Plaintiffs realleges paragraph 1 through 55.

71. NCRL intends to make contributions of less than $1,000 to federal candidates before the 2000 general election, and before future federal elections.

72. 11 C.F.R. § 114.2(b) prohibits all corporations from making contributions in connection with a federal election.

73. 11 C.F.R. § 114.2(b) makes no exception for non-profit, ideological corporations.

74. Plaintiffs seek a declaratory judgment that 11 C.F.R. § 114.2(b) is overbroad and unconstitutional on its face. *See NCRL*, 168 F.3d at 713.

75. In the alternative, Plaintiffs seek a declaration that 11 C.F.R. § 114.2(b)'s prohibition of corporate contributions is contrary to constitutional right under 5 U.S.C. § 706(2)(B), and is therefore void.

76. In the alternative, Plaintiffs seek a declaration that 11 C.F.R. § 114.2(b)s prohibition of corporate contributions is unconstitutional as applied to NCRL, an *MCFL*-exempt corporation. *See NCRL*, 168 F.3d at 714.

77. Plaintiffs also seek a permanent injunction barring the FEC from enforcing the FECA against NCRL predicated on contributions to federal candidates.

Fourth Claim for Relief

78. Plaintiffs realleges paragraphs 1 through 55.

79. In *MCFL*, the Supreme Court held that § 441b violates the First Amendment by banning nonprofit, ideological corporations from making independent expenditures.

80. The FEC's regulation at 11 C.F.R. § 114.10 purports to create a narrow exemption from the ban on corporate expenditures in 2 U.S.C. § 441b for "qualified nonprofit corporations."

81. To qualify, nonprofit corporation must have as its *only* express purpose the promotion of political ideas, it must engage in *no* business activities, must offer *no* incentives such as credit cards, insurance policies or savings plans, and must accept *no* donations from business corporations or labor unions, either directly or indirectly.

82. Plaintiff NCRL has other purposes besides promotion of political ideas; it engaged in small amounts of business activities, which are incidental to its overall purposes; and it accepts corporate contributions, although they are a relatively small percent of its total revenue. Additionally, most of the corporate contributions NCRL receives are the result of individuals who direct their phone company refunds to the nonprofit organization of their choice.

83. Even though NCRL does not qualify as an exempt corporation under 11 C.F.R. § 114.10, it

squarely falls within the Supreme Court's exception in *MCFL*, *see NCRL* 168 F.3d at 714; therefore, the federal government may not constitutionally ban it from making independent expenditures.

84. The Eighth Circuit Court of Appeals ruled that the FEC's regulatory attempt to codify the *MCFL* exemption in 11 C.F.R. § 114.10 is facially unconstitutional because it would "deny the MCFL exemption to a voluntary political association that conducts minor business activities or accepts insignificant corporate donations." *Minnesota Concerned Citizens for Life, Inc.* v. *FEC*, 113 F.3d 129, 130 (8th Cir. 1997).

85. Therefore, Plaintiffs request a declaratory judgment that 11 C.F.R. § 114.10 is, on its face, *ultra vires*, and, under 5 U.S.C. § 706, is void.

86. Plaintiffs seek a declaration that 11 C.F.R. § 114.10 is "in excess of the statutory . . . authority . . ." of the Federal Election Commission and, thus, void under 5 U.S.C. § 706.

87. Plaintiffs seek a permanent injunction barring the FEC from enforcing 11 C.F.R. § 114.10 against it.

WHEREFORE, Plaintiffs respectfully pray for:

(1) A declaratory judgment that 2 U.S.C. § 441b is overbroad and unconstitutional on its face. *See NCRL*, 168 F.3d at 713;

(2) In the alternative, a declaratory judgment that section 441b's prohibition of corporate contributions is unconstitutional as applied to NCRL, an *MCFL*-exempt corporation. *See NCRL*, 168 F.3d at 714;

(3) In the alternative, a declaratory judgment that section 441b's prohibition of corporate expenditures is

unconstitutional as applied to NCRL, an *MCFL*-exempt corporation. *See NCRL*, 168 F.3d at 714;

(4) A permanent injunction barring the FEC from enforcing the FECA against Plaintiffs predicated on contributions to federal candidates;

(5) A permanent injunction barring the FEC from enforcing the FECA against Plaintiffs predicated on NCRL's independent expenditures expressly advocating the election or defeat of federal candidates;

(6) A declaratory judgment that 11 C.F.R. § 114.2(b) is overbroad and unconstitutional on its face. *See NCRL*, 168 F.3d at 713;

(7) A declaratory judgment that 11 C.F.R. § 114.2(b)'s prohibition of corporate contributions is contrary to constitutional right under 5 U.S.C. § 706, and is therefore void;

(8) In the alternative, a declaratory judgment that 11 C.F.R. § 114.2(b)'s prohibition of corporate contributions is unconstitutional as applied to NCRL, an *MCFL*-exempt corporation. *See NCRL*, 168 F.3d at 714;

(9) A permanent injunction barring the FEC from enforcing 11 C.F.R. § 114.2(b) against Plaintiffs;

(11) A declaratory judgment that 11 C.F.R. § 114.10 is on its face contrary to constitutional right and is therefore void under 5 U.S.C. § 706;

(12) A declaratory judgment that 11 C.F.R. § 114.10 is "in excess of [the] statutory . . . authority" of the Commission as provided by the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. § 431 *et seq.*, and, under 5 U.S.C. § 706, is void;

(13) An injunction barring the Defendants from enforcing 11 C.F.R. § 114.10;

(14) A judgment awarding Plaintiffs their costs and attorneys' fees under 28 U.S.C. § 2412;

(15) Such other and further relief as may be just and proper.

STAM, FORDHAM & DANCHI, P.A.

/s/ PAUL STAM, JR.
PAUL STAM, JR.
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LR 2.04 Counsel
Local Counsel for Plaintiff

BOPP, COLESON & BOSTROM

/s/ JAMES R. MASON
JAMES R. MASON
Bar No. 2838-84 (IN)
James R. Mason, III
Bar No. 96-353 (OR)
1 South 6th Street
Terre Haute, IN 47807-3510
(812) 232-2434
Lead Counsel for Plaintiff

ATTORNEYS FOR PLAINTIFFS

ARTICLES OF INCORPORATION
OF
NORTH CAROLINA RIGHT TO LIFE, INCORPORATED
(Name of Corporation)

A NON-PROFIT CORPORATION

We, the undersigned natural persons of the age of twenty-one years or more, acting as incorporators for the purposes of creating a non-profit corporation under the laws of the State of North Carolina, as contained in Chapter 55A of the General Statutes of North Carolina, entitled "Non-Profit Corporation Act", and the several amendments thereto, do hereby set forth:

1. The names of the corporation is North Carolina Right to Life, Incorporated

2. The period of duration of the corporation shall be perpetual

3. The purpose for which the corporation is organized are: (1) Being a non-profit, non-sectarian, public service organization dedicated to protecting and fostering the most basic value of our society-life itself; and being empowered to operate in the City of Greensboro, North Carolina, and in other cities in the State of North Carolina. We advocate positive action to improve and protect human life, and oppose whatever is destructive or detrimental to human life at any stage of development, age or condition. We are especially mindful of the unborn, the aged, the impoverished, the impaired, the incompetent, and all those otherwise weak, disadvantaged or defenseless. Our purpose is to gather and disseminate, by all means of communication, accurate up-to-date information on the subjects of abortion, euthanasia, and other life destroying techniques, and

their affects on the victim, the family, the community, and on the health care profession and society at large; and to further work for pre-life alternatives to abortion and humane solutions to the problems of women who seek abortions; said alternatives being counseling; organizing and carrying out educational programs; to foster and encourage public health programs, to assist in the placing for adoption children of all races and those with handicaps, to assist in the establishment of a comprehensive medical, social and recreational care program for unwed mothers; and to promote anti-poverty programs through job training and child care centers, specifically directed toward the family unit. (2) to make donations for the public welfare, or for religious, charitable, scientific, or educational purposes. (3) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use and otherwise deal in and with, real or personal property, or any interest therein wherever situated. (4) To sell, convey, mortgage, pledge, lease, exchange, transfer and otherwise dispose of al or any part of its property and assets.

4. The corporation is to have the following class or classes of members: (If there are to be no members, so state.) General membership, extended to any person who is in agreement with the purposes of this organization.

5. Directors of the corporations shall be elected in the following manner: As provided in the by-laws.

6. The address of the initial registered office of the corporation is a follows:

Street address, (if none, so state) 1007 North Elam Avenue

City or town Greensboro, North Carolina

County Guilford

The name of the initial registered agent of the corporation at the above address is Emma K. O'Steen

7. The number of directors constituting the initial board of directors shall be _____, and the names and addresses (including street and number, if any) of the persons who are to serve as directors until the first meeting of the corporation or until their successors are elected and qualified are:

NAME	STREET ADDRESS (If none, so state)	CITY OR TOWN
Daniel E. Horley	Route #2, Hilladale Road	Summerfield, N.C. 27358
Emma W. O'Steen	1007 North Elam Avenue	Greensboro, N.C. 27408
David G. O'Steen	1007 North Elam Avenue	Greensboro, N.C. 27408
Thomas B. Sawyer	411 South ElamAvenue	Greensboro, N.C. 27403

8. The names and addresses (including street and number, if any) of all the incorporators are:

NAME	STREET ADDRESS (If none, so stated)	CITY OR TOWN
Daniel E. Horley	Route #2, Hillsdale Road	Summerfield, N.C. 27358
Emma E. O'Steen	1007 North Elam Avenue	Greensboro, N.C. 27408
Thomas B. Sawyer	411 South Elam Avenue	Greensboro, N.C. 27403

9. In addition to the powers granted corporations under the laws of the State of North Carolina, the corporation shall have full power and authority to

10. The regulation of the internal affairs of the corporation shall be through its bylaws established by a quorum of its directors, said quorum to consist of at least one-third of its directors.

IN TESTIMONY WHEREOF, we have hereunto set our hands, this the 8th day of October, A.D. 1973.

[Illegible]
[Illegible]

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

This is to certify that on the 8th day of October, A.D. 1973, before me, a Notary Public personally appeared

Daniel E. Horley, Emma H. O'Steen, and Thomas B. Sawyer

who, I am satisfied, are the persons named in and who executed the foregoing Article of Incorporation, and I having first made known to them the contents thereof, they did each acknowledge that they signed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

In Testimony Whereof, I have hereunto set my hand and official seal, this the 8th day of October, A.D. 1973.

My commission expires January 19, 1975 ROSALIE H. [ILLEGIBLE] (L.3.)

[Illegible statement]

VERIFICATION

I swear (or affirm) under the penalties for perjury under the laws of the United States that the foregoing statements concerning North Carolina Right to Life, Inc., and myself, found in this complaint are true and correct to the best of my knowledge and understanding.

Dated: this 22 day of December, 1999.

/s/ BARBARA HOLT
BARBARA HOLT, PRESIDENT
North Carolina Right to Life, Inc.

VERIFICATION

I swear (or affirm) under the penalties for perjury under the laws of the United States that the foregoing statements concerning Christine Beaumont, found in this complaint are true and correct to the best of my knowledge and understanding.

/s/ CHRISTINE BEAUMONT
CHRISTINE BEAUMONT

Dated: this 29 day of December, 1999.

VERIFICATION

I swear (or affirm) under the penalties for perjury under the laws of the United States that the foregoing statements concerning North Carolina Right to Life, Inc., and myself, found in this complaint are true and correct to the best of my knowledge and understanding.

Date: this 28th day of December, 1999.

/s/ LORETTA C. THOMPSON
LORETTA C. THOMPSON,
Vice President
North Carolina Right to Life,
Inc.

VERIFICATION

I swear (or affirm) under the penalties for perjury under the laws of the United States that the foregoing statements concerning North Carolina Right to Life, Inc. and myself, found in this complaint are true and correct to the best of my knowledge and understanding.

Date: this 28 day of December, 1999.

/s/ STACY J. THOMPSON
STACY J. THOMPSON,
Member of the Board
North Carolina Right to Life,
Inc.

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Supreme Court U.S.
FILED
JAN 8 2003
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No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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58 pp

QUESTION PRESENTED

The Federal Election Campaign Act of 1971, 2 U.S.C. 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

PARTIES TO THE PROCEEDING

Petitioner is the Federal Election Commission. Respondents are Christine Beaumont, Loretta Thompson, Stacy Thompson, Barbara Holt, and the North Carolina Right to Life, Inc.

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In the Supreme Court of the United States

No. 02-403

FEDERAL ELECTION COMMISSION, PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 278 F.3d 261. The opinion of the district court (Pet. App. 41a-60a) is reported at 137 F. Supp. 2d 648.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. A petition for rehearing was denied on May 16, 2002 (Pet. App. 61a-62a). On August 5, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 13, 2002. The petition for a writ of certiorari was filed on September 12, 2002, and was granted on November 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part that "Congress shall make no law * * * abridging the freedom of speech." Section 441b of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 441b, provides in part: "It is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a). Section 441b is reprinted at Pet. App. 71a-75a.

STATEMENT

This case involves a First Amendment challenge brought by a nonprofit advocacy corporation to the longstanding prohibition established by Congress that bars corporations from directly contributing to candidates for federal office.

1. a. For nearly a century, Congress has prohibited all corporations from making direct campaign contributions and certain expenditures in connection with federal elections. See *FEC* v. *National Right to Work Comm.* (*NRWC*), 459 U.S. 197, 208-209 (1982); pp. 11-13, *infra*. Today that prohibition is set forth in Section 441b of the Federal Election Campaign Act of 1971 (FECA), as amended, which in pertinent part makes it unlawful for "any corporation whatever * * * to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. 441b(a).

The prohibition on direct corporate contributions in connection with federal elections is designed to combat "the problem of corruption of elected representatives through the creation of political debts." *NRWC*, 459 U.S. at 208 (quotation omitted). It reflects the fact that all corporations "receive from the State the special

benefits conferred by the corporate structure and present the potential for distorting the political process." *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990). As this Court has emphasized, the prohibition protects the "integrity of our electoral process" by preventing "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption." *NRWC*, 459 U.S. at 208.

At the same time, individuals affiliated with corporations may still engage in voluntary political activity. Section 441b authorizes corporations to establish and solicit "contributions to a separate segregated fund to be utilized for political purposes by a corporation." 2 U.S.C. 441b(b)(2)(C). Such a fund is commonly known as a political action committee or PAC. A corporation may solicit PAC funds from stockholders, certain employees, or members, and a PAC, in turn, may make both contributions and independent expenditures in connection with federal elections. 2 U.S.C. 441b(b). A PAC "may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates contributions to the fund will be spent to assist." *NRWC*, 459 U.S. at 200 n.4.

b. In *NRWC*, this Court upheld a determination by the Federal Election Commission (FEC) that the National Right to Work Committee (NRWC), a nonprofit advocacy corporation, violated Section 441b by soliciting contributions to its PAC from individuals who were not members of NRWC. In so ruling, the Court rejected the argument that such an interpretation of FECA posed any constitutional difficulty, explaining that Congress's effort to address "the problem of corruption of elected representatives through the creation of political debts" justified any burden imposed by Sec-

tion 441b on the political activity of corporations through contributions. 459 U.S. at 208. In addition, while recognizing that Section 441b's categorical prohibition on contributions applied to corporations "without great financial resources" as well as traditional business corporations, the Court refused to "second-guess" Congress's judgment that "prophylactic measures" were necessary to combat the special dangers of actual or apparent corruption posed by corporate contributions to candidates for federal office. *Id.* at 210.

Four years later, in *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986), the Court held that Section 441b's prohibition on independent *expenditures* violates the First Amendment as applied to the Massachusetts Citizens for Life, Inc. (MCFL), a nonprofit advocacy corporation. The Court explained that, because MCFL's resources "in fact reflect popular support for [its] political positions," *id.* at 258, the entity's independent political expenditures did not pose the "danger of corruption" justifying the regulation of election expenditures by traditional business corporations. *Id.* at 259.[1] The Court rejected the argument that *NRWC* compelled a different result, explaining that *NRWC* involved application of Section 441b's prohibition of *contributions*, not expenditures. *Ibid.* As the Court emphasized, "[i]n light of the historical role of contributions in the corruption of the electoral process," "the Government enjoys greater latitude in limiting

[1] The Court stated that MCFL had three features "essential" to its holding: "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; "it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *MCFL*, 479 U.S. at 263-264.

contributions than in regulating independent expenditures." *Id.* at 260, 261-262.

2. Respondent North Carolina Right to Life, Inc. (NCRL) is a nonprofit advocacy corporation organized under the laws of North Carolina. J.A. 28.[2] NCRL is exempt from taxation under Section 501(c)(4) of the Internal Revenue Code, has no shareholders, and is "overwhelmingly funded by private contributions from individuals." J.A. 12, 14. NCRL also accepts contributions from traditional business corporations. J.A. 14. In 1996, NCRL's contributions from such corporations amounted to 2.44% of its total contributions from all sources; that figure increased to 3.57% in 1997, and to 3.63% in 1998. J.A. 15. In addition, NCRL engages in fundraising activities such as raffles and generates revenue from "minor business activities" involving special events and literature that it promotes. *Ibid.*

NCRL is "dedicated to protecting and fostering the most basic value of our society—life itself." J.A. 13. NCRL provides crisis pregnancy counseling, publishes crisis pregnancy literature, and promotes alternatives to abortion. J.A. 14. "To further its general purposes NCRL has spent money for issue advocacy communications and publications such as its newsletter, candidate surveys and voter guides." J.A. 16. "NCRL has made lawful contributions to candidates for state office and has lawfully made independent express advocacy communications advocating the nomination, election or defeat of state candidates." *Ibid.* "NCRL has never made contributions to candidates for federal office." *Ibid.*

[2] The J.A. citations are to the description of NCRL set forth in respondents' complaint, which for purposes of this statement is accepted as true.

But NCRL states that, if it were lawful for it to do so, NCRL would make such contributions. *Ibid.*

NCRL has established a separate segregated fund—North Carolina Right to Life Inc. Political Action Committee—through which it makes contributions and expenditures in connection with federal elections, as required by Section 441b of FECA. See *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 709 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000); *FEC Disclosure Report for North Carolina Right to Life Inc. Political Action Committee* <<http://herndon-1.sdrdc.com>> (committee query for "North Carolina Right to Life") (listing expenditures and contributions).

3. Respondents—NCRL, its officers, and an eligible North Carolina voter—brought this action against the FEC, challenging Section 441b's prohibition on corporate contributions and expenditures under the First Amendment.[3] Respondents sought a declaration that Section 441b is unconstitutional on its face and as applied to NCRL, and an injunction against its enforcement. In October 2000, the district court granted respondents' motion for summary judgment and held that Section 441b is unconstitutional as applied to NCRL

[3] Respondents also challenged the FEC's regulations implementing Section 441b of FECA. See 11 C.F.R. 114.2(b), 114.10. The first regulation (11 C.F.R. 114.2(b)) prohibits contributions and expenditures in connection with federal elections by any corporation and, thus, tracks the prohibition contained in Section 441b. The second regulation (11 C.F.R. 114.10) exempts from the prohibition on independent expenditures corporations that share the same basic features of the corporation in *MCFL*. See Pet. App. 3a-4a, 49a-50a The courts below held that those regulations were invalid as applied to NCRL, *id.* at 34a, 69a, but the question presented in this Court is limited to the application of Section 441b's prohibition on direct contributions. See Pet. i.

with respect to its prohibition on both direct contributions and independent expenditures, but declined to hold the statute unconstitutional on its face. Pet. App. 41a-60a. In January 2001, the district court permanently enjoined the FEC from enforcing Section 441b against NCRL. *Id.* at 63a-68a.

4. a. The court of appeals affirmed. Pet. App. 1a-40a. The court first held that Section 441b's prohibition on independent *expenditures* is unconstitutional as applied to NCRL. In so holding, the court reasoned that NCRL is in material respects like the nonprofit advocacy corporation in *MCFL*, and that this Court's decision in *MCFL* therefore compelled the conclusion that Section 441b's prohibition on independent expenditures may not be applied to NCRL. *Id.* at 6a n.2, 20a-21a. The court further held that Section 441b's prohibition on direct *contributions* violates the First Amendment as applied to NCRL. *Id.* at 25a. In reaching that conclusion, the court rejected the FEC's argument that this Court's decision in *NRWC* called for a different result with respect to the prohibition on direct contributions, as opposed to expenditures. *Id.* at 26a-27a.

The court of appeals reasoned that *NRWC* "did not decide the constitutionality of the corporate ban provision as applied to *MCFL*-type corporations," but instead addressed only the constitutionality of the bar preventing a nonprofit corporation from using its funds to solicit nonmembers to contribute to its PAC. Pet. App. 27a. Moreover, the court continued, "[t]he rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions." *Id.* at 25a. Thus, under the court of appeals' decision, "the distinc-

tion between contributions and expenditures [is] immaterial in this case." *Id.* at 29a.

b. Judge Gregory concurred in part and dissented in part. Pet. App. 35a-40a. He agreed with the court's analysis of Section 441b insofar as it concerned independent expenditures, but dissented with respect to the court's analysis of the prohibition on campaign contributions. In Judge Gregory's view, the court's holding that NCRL was entitled to "an *MCFL*-type exemption for its campaign contributions * * * is inconsistent with [this Court's decision in *NRWC*]." *Id.* at 35a. Pointing to the discussion of *NRWC* in both the majority and dissenting opinions in *MCFL*, he concluded that the Court in *MCFL* had addressed the "very question" in this case, *i.e.*, the "constitutional difference between contributions and independent expenditures in the context of § 441b." *Id.* at 38a-39a. Accordingly, Judge Gregory concluded that this Court's resolution of that issue in "*NRWC* is dispositive with respect to § 441b's ban on corporate contributions." *Id.* at 40a.

c. The Fourth Circuit denied the FEC's petition for rehearing en banc by a vote of seven to four. Pet. App. 61a-62a.[4]

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[4] As noted, the court of appeals' conclusion that Section 441b's prohibition on independent expenditures cannot be applied to NCRL is based on its factbound determination that NCRL shares the same essential features of the nonprofit corporation at issue in *MCFL*. See Pet. App. 20a-21a. The government has not sought certiorari on that aspect of the court of appeals' decision. See Pet. i. Accordingly, as this case comes to the Court, NCRL is not subject to Section 441b's ban on independent expenditures, and the only question is whether the statute's prohibition on direct corporate contributions may be applied to NCRL.

SUMMARY OF ARGUMENT

Under this Court's precedents, the longstanding statutory prohibition on direct campaign contributions by "any corporation whatever," 2 U.S.C. 441b(a), is constitutional as applied to respondent NCRL.

This Court has long recognized that Congress has broad authority to regulate federal elections, and that insulating federal elections from the actual or apparent corruption associated with the creation of political debts is of the utmost importance to American democracy. The statutory prohibition on direct campaign contributions by corporations has been in place for nearly a century and "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *NRWC*, 459 U.S. at 209-210. This Court has repeatedly refused to "second-guess" Congress's judgment that corporate contributions pose special dangers that merit a broad prophylactic prohibition. *Id.* at 210.

The Court has further recognized that direct contributions to political candidates pose a unique risk of actual or apparent corruption due the prospect of a quid pro quo arrangement, and that limits on contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley* v. *Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam). By contrast, limits on election "*expenditures* generally curb more expressive and associational activity than limits on contributions do," and therefore, the Court has stated, may "deserve closer scrutiny than restrictions on political contributions." *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 121 S. Ct. 2351, 2358 (2001) (emphasis added). At the same time, the Court has recognized that individuals affiliated with corporations

may still make contributions in connection with a federal election through a PAC. See *NRWC*, 459 U.S. at 201. The prohibition on direct corporate contributions in connection with federal elections thus imposes a relatively insubstantial burden on First Amendment activity in this vital arena of expression.

The court of appeals' conclusion that Section 441b's prohibition on direct corporate contributions nonetheless violates the First Amendment as applied to respondent NCRL cannot be squared with this Court's decisions. In *NRWC*, this Court recognized that Section 441b's prohibition on corporate contributions is constitutional as applied to "corporations and labor unions without great financial resources, as well as those more fortunately situated," and refused to "second-guess a legislative determination as to the need for [such] prophylactic measures where corruption is the evil feared." 459 U.S. at 210. Moreover, in subsequent decisions, the Court has specifically recognized that *NRWC* accepted Congress's judgment to bar *all* corporations, including nonprofit advocacy corporations, from directly contributing to federal campaigns. See *FEC* v. *National Conservative Political Action Comm. (NCPAC)*, 470 U.S. 480, 495, 500 (1985); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

MCFL only reinforces that conclusion. In that case, the Court held unconstitutional Section 441b's prohibition on independent expenditures as applied to a nonprofit advocacy corporation. In so holding, the Court carefully distinguished *NRWC* on the ground that "the political activity at issue in that case was contributions," not expenditures, and emphasized that the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." 479 U.S. at 259-260. The fundamental constitutional difference between limits on contributions and independent expenditures is deeply rooted in this Court's campaign-finance jurisprudence, see *Colorado Republican*, 121 S. Ct. at 2358-2359, and explains the Court's treatment of Section 441b's prohibition on expenditures in *MCFL*.

There is no reason for this Court to reconsider, much less overturn, its prior decisions accepting Congress's judgment that a prohibition on direct campaign contributions by "any corporation whatever," including a corporation such as NCRL, is warranted to ensure the integrity of federal elections.

ARGUMENT

SECTION 441b'S LONGSTANDING PROHIBITION ON DIRECT CAMPAIGN CONTRIBUTIONS BY CORPORATIONS IS CONSTITUTIONAL AS APPLIED TO RESPONDENT NCRL

A. The Constitutional Validity Of Congress's Prohibition On Direct Contributions By Corporations Is Well-Established

The statutory prohibition on direct campaign contributions by corporations in connection with federal elections has been in place for almost a century. Moreover, as this Court has recognized, the general prohibition on corporate contributions is of "well-established constitutional validity." *NCPAC*, 470 U.S. at 495 (acknowledging "the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office"); see *Colorado Republican*, 121 S. Ct. at 2358-2359; *NRWC*, 459 U.S. at 208-210.

1. This Court has previously canvassed the history of "the movement to regulate the political contributions

and expenditures of corporations and labor unions." *NRWC*, 459 U.S. at 208; see *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 402-409 (1972); *United States* v. *Automobile Workers*, 352 U.S. 567, 570-587 (1957); *United States* v. *CIO*, 335 U.S. 106, 113 (1948). To summarize, federal law has prohibited corporate contributions to candidates for federal offices since 1907. That year Congress—at the urging of President Theodore Roosevelt, who in his annual message to Congress asked that "a law prohibiting political contributions by corporations" be the first item of business—passed the Tillman Act. *Automobile Workers*, 352 U.S. at 57; Act of Jan. 26, 1907 (Tillman Act), ch. 420, 34 Stat. 864. The Tillman Act made it "unlawful for *any corporation whatever* to make a money contribution in connection with [federal elections]." *Ibid.* (quoting 34 Stat. 864-865) (emphasis added).[5]

In 1925, Congress extended the prohibition against corporate contributions in connection with federal elections to include "anything of value," and made the acceptance or conferral of such a contribution a crime. Federal Corrupt Practices Act of 1925, ch. 368, §§ 302, 313, 43 Stat. 1070, 1074. In 1947, Congress strengthened the prohibition again, this time by extending it to "expenditure[s]" as well as contributions. Taft-Hartley Act, ch. 120, § 304, 61 Stat. 159 (codified at 18 U.S.C. 610). Congress recodified these provisions when it enacted FECA in 1971. The current prohibition on direct

[5] In enacting the Tillman Act, Congress considered bills that would have "prohibited political contributions by certain classes of corporations." *Automobile Workers*, 352 U.S. at 573. But Congress rejected such a piecemeal approach to the problems of corruption posed by corporate contributions and, instead, applied its prohibition to "any corporation whatever." *Id.* at 575.

corporate contributions in Section 441b of FECA is "merely a refinement of this gradual development of the federal election statute." *NRWC*, 459 U.S. at 209.[6]

2. The longstanding prohibition on direct corporate contributions "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *NRWC*, 459 U.S. at 210; see *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981). In particular, the prohibition was designed to rid the electoral process of the evils associated with both actual corruption and the appearance of corruption created by the prospect of a "financial *quid pro quo*: dollars for political favors." *NCPAC*, 470 U.S. at 497; see *MCFL*, 479 U.S. at 257, 260; *NRWC*, 459 U.S. at 207-208; *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788 n.26 (1978); *Automobile Workers*, 352 U.S. at 570-575; see also *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 389-390 (2000) (discussing the unique threat of corruption posed by direct political contributions).

The government interests in insulating federal elections from the threat of actual and apparent corruption are "of the highest importance." *Bellotti*, 435 U.S. at 788-789; see *id.* at 788 n.26 ("The importance of the governmental interest in preventing [corruption] has never been doubted.") (quoted in *Nixon*, 528 U.S. at 389); *NCPAC*, 470 U.S. at 496-497 ("preventing corruption or the appearance of corruption are * * * compelling government interests"); *Buckley*, 424 U.S. at 27 (The

[6] On March 27, 2002, President Bush signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. The BCRA made substantial changes to federal campaign-finance laws, but the Act left intact Section 441b's prohibition on direct contributions to federal campaigns by "any corporation whatever." 2 U.S.C. 441b(a).

"appearance of corruption" is "[o]f almost equal concern as the danger of actual *quid pro quo* arrangements."). Indeed, the existence or even suggestion of such corruption "directly implicate[s] the 'integrity of our electoral process,'" *NRWC*, 459 U.S. at 208 (quoting *Automobile Workers*, 352 U.S. at 570), and thus threatens the foundation of American democracy itself.

The prohibition on direct corporate contributions to candidates also responds to the "special characteristics of the corporate structure." *NRWC*, 459 U.S. at 210. As the Court has explained:

> State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

Austin, 494 U.S. at 658-659 (quoting *MCFL*, 479 U.S. at 257). "In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." *NCPAC*, 470 U.S. at 495. That includes an individual's ability to make direct contributions to a candidate for federal office.[7]

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[7] The prohibition on direct corporate campaign contributions in connection with federal elections also "protect[s] individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; see *Pipefitters*, 407 U.S. at 414-415.

3. At the same time, the Court has recognized that direct corporate contributions pose particularly acute problems of actual and apparent corruption, and that the federal prohibition on such contributions is "sufficiently tailored" to the government interest in eliminating such corruption "to avoid undue restriction" of First Amendment interests. *NRWC*, 459 U.S. at 208. In particular, the Court has emphasized that the prohibition is the product of the "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations." *Id.* at 209 (citation omitted); see also *Austin*, 494 U.S. at 660-661 (state statute modeled on Section 441b is "sufficiently narrowly tailored to achieve its goal" of addressing the unique legal and economic concerns posed by corporations).

In a similar vein, the Court has emphasized that limits on political contributions impose "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20-21. As the Court recently reiterated:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. * * * A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it * * * does not in any way infringe the contributor's freedom to discuss candidates and issues.

Nixon, 528 U.S. at 386-387 (quoting *Buckley*, 424 U.S. at 21); see *id.* at 387 (limitations on campaign contributions leave "communication [in this area] significantly unimpaired").

By contrast, the Court has emphasized that limits on election "*expenditures* generally curb more expressive and associational activity than limits on contributions do," and therefore "deserve closer scrutiny than restrictions on political contributions." *Colorado Republican*, 121 S. Ct. at 2358 (emphasis added); see *MCFL*, 479 U.S. at 259-260, 261-262; *NCPAC*, 470 U.S. at 495-496; *California Med. Ass'n*, 453 U.S. at 196-197; *Buckley*, 424 U.S. at 20-21. So too, the Court has also concluded that "limits on contributions are more clearly justified by a link to political corruption than limits on other kinds of unlimited political spending are (corruption being understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder's judgment, and the appearance of such influence)." *Colorado Republican*, 121 S. Ct. at 2358. Certainly, the direct transfer of money to a political candidate raises the specter of quid pro quo corruption in a more direct and historically familiar way than election expenditures made *independent* of a candidate.[8]

[8] Although this Court has concluded that legislatures have more leeway under the First Amendment to combat the well-established threat of real or apparent corruption posed by direct contributions and the creation of political debts, it has also recognized that the Constitution allows for regulation of independent election expenditures when a showing is made that such expenditures pose a threat of distorting or corrupting the political process. See, *e.g.*, *Austin*, 494 U.S. at 660 (holding that the "State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations" in state statute modeled on Section 441b of FECA); *Bellotti*, 435 U.S. at 788 n.26 (recognizing that in an appropriate case "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections"). In any event, because the question presented in this case is limited to Section 441b's prohibition on corporate *contributions*, there is no occasion for the Court to consider the scope of Congress's authority to limit independent expenditures.

Furthermore, in reviewing challenges to the application of Section 441b's prohibition on direct corporate contributions, the Court has recognized that FECA allows individuals affiliated with corporations to make contributions in connection with federal elections through a separate segregated fund or PAC. See *NRWC*, 459 U.S. at 201; 2 U.S.C. 441b(b)(2)(C). Indeed, such a PAC "may be completely controlled by the sponsoring corporation or union," and "'must be separate from the sponsoring [corporation or union] only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *NRWC*, 459 U.S. at 200 n.4; see *Austin*, 494 U.S. at 660; *Buckley*, 424 U.S. at 28 n.31. The ban on direct corporate contributions imposes even less of a burden on corporations that are subject to the exception recognized in *MCFL*, and therefore may make independent election expenditures directly without the use of a PAC.[9]

In other words, Section 441b's prohibition on direct corporate contributions in connection with federal elections imposes a relatively small burden on First Amendment activity in this vital arena. This Court has accepted the legislative judgment that such a burden is

[9] In addition, because Section 441b applies only to corporations and unions, it of course has no effect on the right of individuals to participate in federal election activities.

warranted in light of the overriding government interest in protecting the integrity of federal elections.

B. The Court Has Repeatedly Recognized That The Prohibition On Direct Corporate Contributions Is Valid As Applied To Nonprofit Advocacy Corporations

Congress has unambiguously determined that all corporations—including nonprofit advocacy corporations such as NCRL—should be subject to the prohibition on direct campaign contributions in connection with federal elections. As noted, Section 441b of FECA emphatically makes it unlawful for "*any* corporation *whatever*" to make such contributions. 2 U.S.C. 441b(a) (emphasis added). Thus, the only question in this case is whether that considered legislative judgment should be given effect as applied to a nonprofit advocacy corporation such as NCRL. The Court's prior decisions answer that question in the affirmative.

1. As discussed above, in *NRWC* the Court upheld an FEC determination that a nonprofit advocacy corporation had violated Section 441b by soliciting funds from nonmembers to be used by its PAC to make campaign contributions. 459 U.S. at 201-206. The corporation in *NRWC* was similar in material respects to respondent NCRL. NRWC was a "nonprofit corporation without capital stock" that was formed to educate the public on a particular issue of perceived public concern. *Id.* at 199-200; Pet. App. 2a-3a, *NRWC*, *supra* (No. 81-1506). In addition, while most of NRWC's funding came from individuals, NRWC received some contributions from traditional business corporations. See J.A. 84-86, *NRWC*, *supra* (No. 81-1506).

The Court's decision in *NRWC* focused on whether NRWC had violated Section 441b of FECA by soliciting

PAC funds from individuals who were not members. 459 U.S. at 198-199. But in addressing that question, the Court considered the statute's solicitation limits in the context of Section 441b's broader prohibition on non-PAC contributions by corporations. *Id.* at 207-209. Indeed, the Court explained at the very outset of its decision that the question whether NRWC improperly solicited nonmembers was "but the tip of the statutory iceberg," which included Section 441b's prohibition on direct corporate campaign contributions. *Id.* at 198 n.1. Furthermore, in deciding *NRWC*, the Court specifically considered both the broader "statutory prohibitions," *i.e.*, the prohibition on direct corporate campaign contributions, and the "exceptions," *i.e.*, the provisions allotwing such contributions through PACs. *Id.* at 208.

The Court in *NRWC* explicitly assumed that "NRWC is a corporation covered by § 441b," 459 U.S. at 205 n.6, and unanimously affirmed that Section 441b is a constitutionally legitimate effort by Congress to address "the problem of corruption of elected representatives through the creation of political debts." *Id.* at 208 (quoting *Bellotti*, 435 U.S. at 788 n.26); see *id.* at 210 n.7. As the Court stated: "[Section 441b] reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 209-210. In considering that "legislative judgment," the Court recognized that Section 441b applies to "corporations and labor unions without great financial resources, as well as those more fortunately situated," but refused to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210.

2. In subsequent decisions, the Court has repeatedly acknowledged that *NRWC* upheld Section 441b's prohibition on direct campaign contributions as applied to

nonprofit corporations that may lack "great financial resources." *NRWC*, 459 U.S. at 210.

a. In *NCPAC*, the Court held unconstitutional a provision of the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, which made it a crime for PACs to make independent *expenditures* in support of presidential candidates that have accepted public funding. See 470 U.S. at 491, 501. But in so holding, the Court reaffirmed the reasoning of *NRWC*, stating: "In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, *though contributions by the latter might not exhibit all of the evil that contributions by traditionally economically organized corporations exhibit.*" *Id.* at 500 (emphasis added). The Court further emphasized that such "deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized" is "proper" in the case of corporations. *Ibid.* But the Court explained that, unlike Section 441b, the statute at issue in *NCPAC* was not limited to corporations, and instead "indiscriminately lump[ed] with corporations any 'committee, association, or organization.'" *Ibid.*

In *NCPAC*, the Court further recognized that "*NRWC* is consistent with th[e] Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates," given that contributions involve direct transfers of funds to candidates and serve only as a general expression of support for a candidate. 470 U.S. at 495-496 (citing *Bellotti*, 435 U.S. at 789-790). *NRWC*, a contribution case, is consistent with the "well-

established constitutional validity of legislative regulation of corporate contributions to candidates for public office." *Id.* at 495. But, the *NCPAC* Court held, the long-accepted justifications for adopting "prophylactic limitations" with respect to campaign contributions did not justify the prohibition challenged in *NCPAC* with respect to election *expenditures*. *Id.* at 501.

b. *MCFL* is to the same effect. As discussed above, in *MCFL* this Court held that Section 441b's prohibition on independent *expenditures* is unconstitutional as applied to a nonprofit advocacy corporation similar to respondent NCRL. 479 U.S. at 241. Like respondent NCRL, MCFL was a nonprofit corporation without capital stock formed for the express purpose of "foster[ing] respect for human life." *Id.* at 241-242; see *id.* at 264. MCFL had a policy of not accepting any contributions from business corporations. *Id.* at 241, 264. As noted above, NCRL does not have such a policy, but states that it is nonetheless "overwhelmingly funded by private contributions from individuals." J.A. 14.

In concluding that Section 441b's prohibition on independent expenditures is unconstitutional as applied to MCFL, the Court distinguished *NRWC*. As the Court explained, "the political activity at issue in that case was *contributions*," not expenditures, and this Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL*, 479 U.S. at 259-260 (emphasis added); see *id.* at 261-262 ("[T]he Government enjoys greater latitude in limiting contributions than in regulating independent expenditures."); p. 29, *infra*. Moreover, the Court in *MCFL* reiterated that "[i]n light of the historical role of *contributions* in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in [*NRWC*] to-

support a limitation on the ability of a committee [covered by Section 441b] to raise money for direct contributions to candidates." *Id.* at 260 (emphasis added).

The Chief Justice's dissenting opinion in *MCFL* underscores the significance of the majority's careful treatment of *NRWC*. See 479 U.S. at 268-270 (Rehnquist, C.J., joined by White, Blackmun, and Stevens, JJ., dissenting in part and concurring in part). After reviewing the history of Section 441b of FECA and noting that "[i]t is, of course, clear that Congress intended § 441b to apply to corporations like MCFL," *id.* at 267 n.1., the Chief Justice analogized the corporation in *NRWC* to the one in *MCFL*. See *id.* at 269 ("The corporation whose fund was at issue [in *NRWC*] was not unlike MCFL—a nonprofit corporation without capital stock, formed to educate the public on an issue of perceived public significance."). In addition, the Chief Justice emphasized that in *NRWC* the Court refused to second-guess Congress's judgment "as to the need for prophylactic measures" in the case of Section 441b's prohibition on corporate contributions, and argued that the same restraint was called for in reviewing the statute's prohibition on corporate expenditures. *Id.* at 266.

Pointing to "the historical role of contributions in the corruption of the electoral process," and the heightened First Amendment scrutiny that applies to restrictions on independent spending as opposed to contributions, the Court in *MCFL* disagreed with the Chief Justice that "the desirability of a broad prophylactic rule" with respect to contributions could "justify treating alike business corporations and [corporations such as MCFL] in the regulation of *independent spending*." *MCFL*, 479 U.S. at 260 (emphasis added). But the *MCFL* Court nonetheless reaffirmed that, as it recognized in *NRWC*,

such "a broad prophylactic rule" is permissible with respect to corporate contributions. *Ibid.*

c. In *Austin*, the Court again reaffirmed the rationale of *NRWC*. *Austin* involved a First Amendment challenge brought by a nonprofit advocacy corporation, the Michigan Chamber of Commerce (Chamber), to a state law modeled on Section 441b of FECA prohibiting corporations from making election expenditures. See 494 U.S. at 655 & n.1. In upholding that state law, the Court rejected the Chamber's argument that the provision was "substantially overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital." 494 U.S. at 661. As the Court explained:

> We rejected a similar argument in [*NRWC*], in the context of federal restrictions on the persons from whom corporations could solicit contributions to their segregated funds. The Court found that the federal campaign statute, 2 U.S.C. § 441b, "reflect[ed] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the *potential* for such influence that demands regulation." Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies [the state law's] general applicability to all corporations.

Ibid. (quoting *NRWC*, 459 U.S. at 209-210) (emphasis in original).[10]

In short, this Court has repeatedly reaffirmed its decision in *NRWC* accepting the legislative judgment to prohibit direct contributions in connection with federal elections by "any corporation whatever," 2 U.S.C. 441b(a), including nonprofit advocacy corporations. As explained next, the court of appeals in this case erred in invalidating that same legislative judgment.

C. The Court Of Appeals Erred In Concluding That Section 441b's Prohibition On Direct Corporate Contributions Is Unconstitutional As Applied To NCRL

In holding that Section 441b's prohibition on direct campaign contributions is unconstitutional as applied to respondent NCRL, the court of appeals reasoned that the FEC's reliance on *NRWC* was misplaced, Pet. App. 26a-27a, and that this Court's decision in *MCFL* dictated the conclusion that Section 441b's prohibition on contributions is invalid as applied to NCRL, *id.* at 23a-25a. That reasoning cannot be squared with this Court's decisions in *NRWC* and *MCFL*, or with numerous other decisions of this Court recognizing Congress's broad authority to limit direct campaign contributions in connection with federal elections.

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[10] The *Austin* Court further rejected the Chamber's argument that the State's prohibition on independent expenditures by corporations was unconstitutional under *MCFL*, finding that the Chamber was distinguishable in several respects from the nonprofit corporation in *MCFL*. See 494 U.S. at 661-665. In that regard, the Court noted, *inter alia*, that the Chamber did not have a policy against accepting contributions from business corporations and, thus, "could, absent application of [the state law], serve as a conduit for corporate political spending." *Id.* at 664.

1. As Judge Gregory concluded in his separate opinion, there is "no way to avoid the import of the Supreme Court's analysis in *NRWC*." Pet. App. 35a. As discussed above, in *NRWC* this Court specifically considered the application of Section 441b's prohibition on direct corporate contributions in the context of an FEC enforcement proceeding involving a nonprofit advocacy corporation similar to NCRL. Moreover, the Court recognized that Section 441b applies to corporations "without great financial resources, as well as those more fortunately situated," and unanimously "accept[ed]" Congress's judgment that due to the unique threat of corruption posed by corporations in connection with federal elections "prophylactic measures" were appropriate to ensure the integrity of the electoral process. *NRWC*, 459 U.S. at 209-210.

To be sure, the precise question presented in *NRWC* focused on whether the nonprofit corporation at issue had violated Section 441b by soliciting PAC funds from nonmembers. But as the Court made clear, Section 441b's limits on PAC solicitations only can be understood in light of the statute's general prohibition on corporate contributions. See *NRWC*, 459 U.S. at 198 n.1 ("As will appear from the following discussion, the phrasing of this question is but the tip of the statutory iceberg."); *id.* at 208 ("We are also convinced that the statutory prohibitions and exceptions we have considered are sufficiently tailored to [Congress's purposes in enacting Section 441b] to avoid undue restriction on the associational interests asserted by respondent."); *id.* at 208-210 & n.7 (reviewing Section 441b's prohibition on direct corporate contributions).

Furthermore, as discussed in Part B, *supra*, in subsequent decisions this Court has consistently read *NRWC* as broadly upholding Section 441b's prohibition

on direct campaign contributions as an appropriate prophylactic measure to combat the evils of actual and apparent corruption, including with respect to nonprofit corporations that may not pose the same threat of corruption as traditional business corporations. See *NCPAC*, 470 U.S. at 495-496, 500; *MCFL*, 479 U.S. at 259-260; *Austin*, 494 U.S. at 661. Indeed, in *NCPAC* this Court stated that "[i]n *NRWC* we *rightly* concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." 470 U.S. at 500 (emphasis added). So too, in *Austin*, the Court recognized that *NRWC* rejects the notion that a prohibition on direct corporate contributions may not be applied to a nonprofit corporation simply because such a corporation "may not have accumulated significant amounts of wealth." 494 U.S. at 661.

Lower courts have read this Court's decision in *NRWC* in the same fashion. In particular, in *Kentucky Right to Life, Inc.* v. *Terry*, 108 F.3d 637, cert. denied, 522 U.S. 860 (1997), the Sixth Circuit upheld a state law that prohibited, *inter alia*, corporations from making direct campaign contributions in connection with state elections. The plaintiffs in that case argued that the Kentucky Right to Life, Inc. (KRL), a nonprofit advocacy corporation similar to NCRL, could not be barred from making campaign contributions in connection with such elections, and "that the reasoning underlying *NRWC* does not apply to nonprofit corporations like KRL because such corporations do not have the resources to amass the political 'war chests' which

spurred Congress to enact the statute at issue in *NRWC*." *Id.* at 646. The Sixth Circuit disagreed.

The Sixth Circuit explained that, despite the "broad application" of Section 441b of FECA, this Court in *NRWC* deferred to Congress's judgment that "prophylactic measures" were needed to combat the well-documented problems posed by campaign contributions, even in the case of a nonprofit corporation, such as the plaintiff in *NRWC*. See 108 F.3d at 646. Indeed, the Sixth Circuit held that "the reasoning of *NRWC* applie[d] *directly*" to the challenge to the statute at issue in *Kentucky Right to Life*. *Ibid.* (emphasis added); see *ibid.* ("Because the Supreme Court upheld broad federal prohibitions against direct corporate contributions as constitutionally permissible to limit potential corruption, we likewise uphold the * * * restrictions [in this case].").[11]

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[11] Other courts have also read this Court's decision in *NRWC* as generally affirming the constitutionality of Section 441b's ban on direct corporate contributions. See, *e.g.*, *Mariani* v. *United States*, 212 F.3d 761, 773 (3d Cir.) (en banc) ("Because of the strong implication we draw from *NRWC*, [*NCPAC*], and *Austin*, * * * we feel compelled to reject [plaintiff's] facial challenge to § 441b(a)."), cert. denied, 531 U.S. 1010 (2000); *Athens Lumber Co.* v. *FEC*, 718 F.2d 363 (11th Cir. 1983) (en banc) (per curiam) ("Viewing the substantive constitutional issues as being controlled by the Court's unanimous opinion in [*NRWC*], and for the reasons there stated, we find the limitations and prohibitions of which appellants complain to be constitutional."), cert. denied, 465 U.S. 1092 (1984). The court of appeals in this case believed that its narrow interpretation of *NRWC* was supported by the District of Columbia Circuit's decision in *FEC* v. *National Rifle Ass'n*, 254 F.3d 173 (2001). See Pet. App. 27a-28a. But as the District of Columbia Circuit emphasized in its order denying rehearing in that case, *National Rifle Ass'n* concerned the limitation on independent *expenditures*. See *FEC* v. *National Rifle Ass'n*, No. 00-5163 (Aug. 23, 2001) ("[W]e emphasize, as should be obvious from our opinion,

2. *MCFL* only bolsters that interpretation of *NRWC*. Indeed, in his dissenting opinion in *MCFL*, the Chief Justice (who authored the unanimous decision for the Court in *NRWC*) reasoned that *NRWC* had settled that Section 441b "is constitutionally sound and entitled to substantial deference" in light of the longstanding "concerns arising from corporate campaign spending." 479 U.S. at 266-267. The majority in *MCFL* did not take issue with either the result or reasoning in *NRWC*, but instead distinguished that case based on the fact that it involved application of Section 441b's prohibition on direct corporate contributions, and not expenditures. See *id.* at 259-260. As the Court explained:

> [T]he political activity at issue in [*NRWC*] was *contributions* * * * . We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in [*NRWC*] to support a limitation on the ability of a committee to raise money for direct contributions to candidates. The limitation on solicitation in this case, however, means that nonmember corporations can hardly raise any funds at all to engage in political speech warranting the highest constitutional protection. * * * Therefore, the desirability of a broad prophylactic rule cannot justify treating alike business corporations and appellee in the regulation of *independent spending*.

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that nothing in this case involves corporate contributions made directly to candidates.").

Ibid. (citations omitted; emphasis added); see *id.* at 261-262 ("[T]he Government enjoys greater latitude in limiting contributions than in regulating independent expenditures.").

The court appeals reasoned that the distinction between contributions and expenditures is "immaterial" in this case. Pet. App. 29a. But that distinction is the key to *MCFL*'s analysis of *NRWC* and, more fundamentally, is deeply entrenched in this Court's campaign-finance jurisprudence. See *Colorado Republican*, 121 S. Ct. at 2358-2359 (Given the different First Amendment interests at stake, "we have routinely struck down limitations on independent expenditures by candidates, other individuals, and groups, while repeatedly upholding contribution limits") (footnote and citations omitted); *Nixon*, 528 U.S. at 386 (discussing the constitutional "line between expenditures and contributions"); *id.* at 386-389; *NCPAC*, 470 U.S. at 495-496 ("a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates"); accord *California Med. Ass'n*, 453 U.S. at 196-197; *Buckley*, 424 U.S. at 20-22; see also *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610 (1996) (opinion of Breyer, J.) ("The provisions [in this area] that the Court found constitutional mostly imposed *contribution* limits.") (emphasis in original).

The court of appeals accordingly erred in concluding that "[t]he rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions." Pet. App. 25a. Moreover, that rationale is particularly misplaced with respect to a nonprofit advocacy corporation such as respondent NCRL, which does not

have a policy against accepting contributions from traditional business corporations. See J.A. 14-15. As this Court recognized in *Austin*, 494 U.S. at 664, such a corporation could "serve as a conduit for corporate political spending," and thus presents a risk of actual or apparent corruption. In any event, this Court has already accepted Congress's judgment that a broad prophylactic rule proscribing campaign contributions by "any corporation whatever," 2 U.S.C. 441b(a), is warranted to ensure the integrity of federal elections. There is no more reason to second-guess that considered legislative judgment today than there was to do so in *NRWC*.

3. The court of appeals also faulted Section 441b on the ground that it constitutes "a complete ban on NCRL's making contributions." Pet. App. 12a; see *id.* at 28a. But in *Austin*, this Court specifically rejected a similar argument in the context of a state law modeled on Section 441b, emphasizing that the law left corporations free to engage in political activity through a PAC. See *Austin*, 494 U.S. at 660 ("Contrary to the dissents' critical assumptions, the Act does not pose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds"). Similarly, in *NRWC* this Court recognized that, while barring direct contributions, Section 441b nonetheless permits corporations to participate "in the federal electoral process by allowing them to establish and pay the administrative expenses of [a PAC]." 459 U.S. at 201. As noted, respondent NCRL has already established and made political contributions and expenditures through such a PAC. See p. 6, *supra*.

Moreover, corporations that fit within the exception established by *MCFL* enjoy a unique opportunity to participate in the political process more directly

through independent expenditures. For such corporations, Section 441b bars only direct contributions which pose the greatest risk of actual and apparent corruption yet involve less expressive activity than independent expenditures. In that regard, respondent NCRL occupies a much more favorable position under Section 441b than most corporations. As discussed, the court of appeals held that under this Court's decision in *MCFL* Section 441b's prohibition on independent expenditures may not be applied to NCRL. See Pet. App. 21a.

* * * * *

This Court has repeatedly affirmed the "constitutional validity" (*NCPAC*, 470 U.S. at 495) of the categorical prohibition at issue in this case on direct campaign contributions by corporations, and emphasized that it will not "second-guess a legislative determination as to the need for [such] prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210. There is no reason for the Court to reconsider, much less upset, that settled precedent in this case.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as the court held that Section 441b of FECA's prohibition on direct corporate contributions is unconstitutional as applied to respondent NCRL.

Respectfully submitted.

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No. 02-403

In The
Supreme Court of the United States

FEDERAL ELECTION COMMISSION, *Petitioner*,

v.

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC., *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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Counterstatement of Question Presented

Are expressive associations that this Court held are not a prohibited source for independent expenditures, because they pose no potential for political corruption, also not a prohibited source for contributions?

Corporate Disclosure Statement

This statement is unchanged. *Brief in Opposition* at ii.

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Dep't of Treas., I.R.S., Exempt Organizations-Technical Instruction Program for FY 2003 6

Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgment of Expression?*, 2 Wm. & Mary Bill Rts. J. 305 (1993) 40

Richard L. Perry & John C. Cooper, eds., *Sources of Our Liberties* (rev. ed. 1991) 7

Marilyn E. Phelan, *Nonprofit Enterprises* (2000) .. 17

Susan Rees, *Effective Nonprofit Advocacy* (1998) (Working Paper Series, Nonprofit Sector Research Fund, The Aspen Institute) 41

Lester M. Salamon, *Holding the Center: America's Non-profit Sector at a Crossroads* (1997) 9

Lester M. Salamon & Stefan Toepler, *The Influence of the Legal Environment on the Development of the Nonprofit Sector* (2000) (Johns Hopkins Center for Civil Society Studies, Working Paper Series, No. 17) 41

Alexis de Tocqueville, 2 *Democracy in America* (Phillips Bradley, ed., Vintage Books ed. 1990) (1840) 7-8

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Counterstatement of the Case

The government's Statement of the "case" and "facts," Rule 24.1(g), is mainly the government's spin on prior cases. *Brief for the Petitioners* (*Pet. Brf.*) at 2-5. This spin distorts the holding of *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), and ignores the application of that holding by the court below.

This Court, in *MCFL*, held that certain nonprofit ideological corporations are not a prohibited source for political activity because they do not "merely pose[] less of a threat of the danger that has prompted the regulations. Rather [they] do[] not pose such a danger at all." *Id.* at 263. The "danger," of course, was the "*potential* for unfair deployment of wealth for corporate purposes," and this Court held that "[g]roups such as MCFL . . . *do not pose that danger of corruption.*" *Id.* at 259 (emphases added).

Thus, while this Court focused, in *MCFL*, on the nature of the *group*, which "do[es] not pose that danger of corruption," the government shifts the focus to the group's *expenditures*. *Pet. Brf.* at 4 ("[T]he entity's independent political expenditures did not pose the 'danger of corruption' justifying the regulation of election expenditures by traditional business corporations."). The critical question in *MCFL*, however, was whether MCFL could be prohibited from all "political activity," because the group's nature required "concern over the corrosive influence of concentrated corporate wealth." 479 U.S. at 257. However, this Court held that "MCFL is not the type of 'traditional [corporation] organized for economic gain,' *NCPAC* [*v. FEC*], 470 U.S. [480,] 500 [(1985)], that has been the focus of regulation of corporate political activity." 479 U.S. at 259.

This focus on the nature of the group, rather than the nature of the "political activity," was the critical point in the decision of the court below, which the government

also ignored. *Pet. Brf.* at 7-8. As the Fourth Circuit explained:

> Organizations that in substance pose no risk of 'unfair deployment of wealth for political purposes' may not be banned from participating in political activity simply because they have taken on the corporate form. *MCFL*, 479 U.S. at 259, 107 S. Ct. 616. The rationale utilized by the Court in *MCFL* to declare prohibitions on independent expenditures unconstitutional as applied to *MCFL*-type corporations is equally applicable in the context of direct contributions. . . . A corporation that qualifies for an *MCFL* exemption poses no special threat to the political process. *See MCFL*, 479 U.S. at 263, 107 S. Ct. 616 ("It is not the case . . . that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose such a threat at all."). As a consequence, neither [North Carolina Right to Life]'s expenditures nor its contributions may be prohibited under the First Amendment.

Petition Appendix (*P.A.*) at 25a.

This distinction is especially important in light of the government's characterization of North Carolina Right to Life (NCRL), in the Question Presented, as "a nonprofit corporation whose primary purpose is to engage in political advocacy." *Pet. Brf.* at I. It is undoubtedly true that "NCRL, like MCFL, 'was formed to disseminate *political* ideas, not to amass capital.'" *P.A.* at 23a (citing *MCFL*, 479 U.S. at 259) (emphasis added). However, its primary purpose is not candidate advocacy, since "should MCFL's independent spending become so extensive that the organization's *major purpose* may be regarded as *campaign activity*, the corporation would be classified as

a political committee. See *Buckley*[*v. Valeo*], 424 U.S. 1[,] 79 [(1976)]." *MCFL*, 479 U.S. at 262 (emphases added).[1] By characterizing NCRL as a corporation whose "primary purpose" is "political advocacy," without clearly defining such advocacy as issue advocacy, the government implies that NCRL is like a PAC. This is not true.[2]

NCRL is like MCFL: "Its central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of candidates," *MCFL*, 479 U.S. at 253 n.6, and, as such, qualifies for the *MCFL* exemption from the prohibition on corporate political activity in federal election law. 2 U.S.C. § 441b.[3]

Summary of the Argument

The government insists that form governs—NCRL made its Procrustean bed by incorporating for liability protection, and NCRL should now lie quietly while Procrustes racks it to fit the business corporation frame. Deference must be accorded congressional preference for a bright-line, prophylactic rule, despite complete absence of the corruption potential justifying such a rule.

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[1] *See also infra*, note 3, discussing the IRS's "primary activity" test, which prohibits nonprofits from having "expenditures for political campaigns" as their "primary activity."

[2] The undisputed facts about NCRL are succinctly set out in the verified complaint. *J.A.* at 10-17.

[3] The *Brief Amicus Curiae of the Brennan Center for Justice at New York University School of Law in Support of Petitioner* solely addresses FEC regulation 11 C.F.R. 114.10 (defining *MCFL*-type corporations) and the holding of the court below that NCRL qualifies for the *MCFL* exemption, an issue the FEC lost below and for which the Solicitor General acknowledges that he did not seek certiorari review. *Pet. Brf.* at 6 n.3, 8 n.4. Thus, this *Brief Amicus Curiae* should be disregarded.

In *MCFL*, however, this Court recognized that pro forma "rel[iance] on the long history of regulation of corporate political activity" "requires close examination of the underlying rationale for this longstanding regulation," *MCFL*, 479 U.S. at 256-57, and that "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate *form per se*, but about the *potential* for unfair deployment of wealth for political purposes. Groups such as MCFL . . . *do not pose that danger of corruption*." *Id.* at 259 (emphases added). This was because the *MCFL* classification was self-limiting—any corporation attempting to realize the "potential" that made business corporations a threat would immediately remove itself from the *MCFL* classification. *Id.* at 263-64. Thus, *MCFL*-type corporations were different in "kind," not "degree," and deference to congressional "desire for a bright-line rule" would fail constitutional mandate. *Id.* at 263.

This rationale is equally applicable whether the proposed political activity is an independent expenditure or a contribution to a candidate. While it is true that this Court has distinguished between expenditures and contributions—upholding limits on the amount of contributions but striking down limits on expenditures—this was not based on the source of the contribution, but on its amount. Here, the question is not its amount, but its source—contributions from corporations would be subject to contribution limits. Because *MCFL*-type corporations pose no danger of corruption, they should not be a prohibited source of political activity, whether independent expenditure or contribution.

Because there is no reason to overturn the rationale of *MCFL*, that rationale should be accorded stare decisis effect and substance should triumph over form. Prophylaxis is unnecessary absent anything to prevent, and a

"bright-line" rule that violates the Constitution cannot be upheld.

Argument

I. Expressive Associations Give Ordinary Americans an Amplified Voice on Issues Vital to the Republic.

Issue advocacy groups, such as NCRL, are private, expressive associations that provide a vehicle for average citizens to effectively participate in the political process by pooling resources to amplify their voices to advocate issues of public concern, lobby for legislation, and directly promote the election of candidates favoring those issues. The wealthy and powerful have no such need,[4] but citizen

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[4]The *Amicus Curiae Brief of the Association of Trial Lawyers of America in Support of the Petitioner* represents the view of rich, powerful, influential individuals who are experienced at expressing themselves and educated in the intricacies of complying with legal rules. ATLA is approximately 50,000 plaintiffs' trial lawyers. *Id.* at 2. They have little need for *MCFL*-type expressive associations in order to be heard in the political marketplace. Perhaps only the Screen Actors Guild represents members with more personal financial clout. While ATLA asserts that it "is also a nonprofit corporation," *id.*, it made no representation that it is an *MCFL*-type organization. And ATLA's self-interested membership is a far cry from the very ordinary Americans that make up diminutive, poor, public-interest NCRL.

Thus, when these lawyers say that *they* have a PAC and compliance burdens "are not so onerous," *id.*, they are wholly out of touch with the reality of NCRL's experience and of this Court's description of the significant burden that such requirements impose on unsophisticated organizations of ordinary folks with little legal experience and few resources. *MCFL*, 479 U.S. at 254-56; *id.* at 266 (O'Connor, J., concurring in part and concurring in the judgment). *See infra* Part IV.B (discussion of failure of PAC alternative).

ATLA argues that even if "NCRL is exempted from § 441b requirements, NCRL would remain subject to the ban on campaign contributions which it accepted in exchange for tax exemption." *ATLA*

(continued...)

groups are a vital populist tool for maintaining the equality envisioned in the *Declaration of Independence*. *See NCPAC*, 470 U.S. at 495 ("To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources."). And contributing in association with like-minded persons to like-minded candidates is a vital part of advocating for issues. *P.A.* at 6a-7a.

Authentic grassroots citizen groups are not part of the problem this Nation faces, but part of the solution. Americans have been from the beginning a nation of

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[4](...continued)
Brf. at 14 (citing I.R.C. § 501(c)(4) and Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (as amended in 1990)). However, NCRL's tax-exempt status under § 501(c)(4) does not prohibit it from making contributions to candidates. Organizations exempt under § 510(c)(4) "may engage in political campaigns on behalf of or in opposition to candidates for public office provided that such intervention does not constitute the *organization's primary activity*." Dep't of Treas., I.R.S., *Exempt Organizations-Technical Instruction Program for FY 2003* at L2 (*Exempt Organizations*) (emphasis added). This is known as the "primary activity" test, deriving from Treas. Reg. § 1.501(c)(4)-1(a)(2)(i), which states that "[a]n organization is operated exclusively for the promotion of social welfare *if it is primarily engaged* in promoting in some way the common good and general welfare of the people of the community" (emphasis added). Thus, "IRC 501(c) organizations may generally make expenditures for political campaigns if such activities (and other activities not furthering its exempt purposes) do not constitute the organization's primary activity." *Exempt Organizations* at L3 (citing Rev. Rul. 81-95, 1981-1 C.B. 332 ("less than primary participation in political campaigns will not adversely affect its exempt status")).

joiners,[5] as Alexis de Tocqueville observed nearly two centuries ago, and such association is part of the genius of America: "Americans of all ages, all conditions, and all dispositions constantly form associations." Alexis de Tocqueville, 2 *Democracy in America* 106 (Phillips Bradley, ed., Vintage Books ed. 1990) (1840) (chap. V, para. 2). He added:

> In democratic countries the science of association is the mother of science; the progress of all the rest depends upon the progress it has made.
>
> Among the laws that rule human societies there is one which seems to be more precise and clear than all the others. If men are to remain civilized or to become so, the art of associating

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[5]The right to assemble to petition the government as an expressive association is a deeply rooted tradition, tracing its lineage as far back as the association of nobles that wrung from the English monarchy King John's Charter (Magna Carta), which itself acknowledged a right to petition the King at chapter 21. *See* Richard L. Perry & John C. Cooper, eds., *Sources of Our Liberties*, 21 (rev. ed. 1991) (*Sources*).

> The rights of the people to assemble and petition the government for a redress of grievances are, of course closely related to the right of free discussion. For centuries petitions of the people had been used to present grievances to the king. Flagrant violations of this customary privilege by James II (1685-89) led to one of the provisions of the English Bill of Rights of 1689.

Sources, at 426 (footnote omitted).

American colonists assumed that association and assembly to petition were their rights as subjects of the British crown, asserting, "That [the people] have a right peaceably to assemble, consider of their grievances [sic], and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal." Declaration and Resolves of the First Continental Congress, Oct.14, 1774 (8th Resolution) (quoted in *Sources* at 288).

together must grow and improve in the same ratio in which the equality of conditions is increased.

Id. at 110 (chap. V, para. 14).

Tocqueville concluded that free association is an inalienable right and issued a warning against restricting it:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. *No legislator can attack it without impairing the foundations of society.*

Id. at 196 (chap XII, para. 17) (emphasis added).

Nonprofit associations continue to perform this vital role in our modern democracy:

> In addition to solving problems themselves, nonprofit organizations also play a vital role as mechanisms for mobilizing broader public attention to societal problems and needs. In this sense, they give crucial support to another basic value, the value of free expression. In a complex society such as ours, the right to free expression has little effective meaning unless it is joined to the right of free association, so that individuals can merge their individual voices and thereby make them effective. Nonprofit organizations are among the principal vehicles for doing this. Indeed, most of the social and political movements that have animated American life over the past half century or more—the women's suffrage movement, the labor movement, the civil rights movement, the environmental movement, the consumer movement, the equal rights movement, and now the conservative movement[6]—have operated through private, nonprofit organizations. By making it possible to surface significant social and political concerns, to give voice to under-represented people and points of view, and to integrate these perspectives into social and political life, these organizations function as a kind of social safety valve that has helped to preserve American democracy and maintain a degree of social peace in the midst of massive, and often dramatic, social dislocations.

Lester M. Salamon, *Holding the Center: America's Nonprofit Sector at a Crossroads* 9 (1997).

The right to associate and the ability of average citizens to thereby affect public policy are so essential to the Republic that this Court has recognized free association as a fundamental right with powerful constitutional protection. The right was articulated most fully in *NAACP v. Alabama*, 357 U.S. 449 (1958), when this Court rejected Alabama's attempt to compel disclosure of the membership list of the National Association for the Advancement of Colored People. The unanimous Court strongly affirmed constitutional protection for free political association to amplify the voices of ordinary Americans:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remark-

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[6]Jeffrey Berry argues that liberal groups have had the most success in influencing public policy through the efforts of nonprofit advocacy groups. Jeffrey M. Berry, *The New Liberalism: The Rising Power of Citizen Groups* 2-3 (1999).

ing upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to *political*, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (citations omitted) (emphasis added).[7]

Since *NAACP v. Alabama*, this Court has consistently protected the freedom to associate for private groups engaged in First Amendment protected activities. *See NAACP v. Button*, 371 U.S. 415 (1963) (striking down a prohibition on soliciting prospective litigants for civil rights cases by attorneys for the NAACP); *Healy v. James*, 408 U.S. 169 (1972) (requiring college to justify denying recognition to student organization); *In re Primus*, 436 U.S. 412 (1978) (holding unconstitutional rule barring lawyer solicitation as applied to ACLU); *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982) (holding that NAACP boycott activities were protected by First Amendment).

Protection of the association right focuses on the difference between expressive and nonexpressive associations. "[T]his Court's case law recognizes radically

[7]The freedom of association finds its origin in the nexus between the freedom of speech and the freedom of assembly, *see De Jonge v. Oregon*, 299 U.S. 253 (1937); *Thomas v. Collins*, 323 U.S. 516 (1945), and was first explicitly recognized by this Court in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

different constitutional protections for expressive and nonexpressive associations. . . . The proper approach to analysis of First Amendment claims of associational freedom is, therefore, to distinguish nonexpressive from expressive associations and to recognize the former lack the full constitutional protections possessed by the latter." *Roberts v. United States Jaycees*, 468 U.S. 609, 638 (1984) (O'Connor, J., concurring). In so doing, this Court has found the Jaycees and the Rotary Club to be nonexpressive associations, *id.*; *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and the Boston St. Patrick's Day parade and the Boy Scouts to be expressive associations. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Boy Scouts of America v. Dale*, 520 U.S. 640 (2001).

This association liberty has also been vigorously protected from campaign finance restrictions. The association liberty, like political speech, is a First Amendment right and "the constitutional guarantee [of the First Amendment] has its *fullest and most urgent application* precisely to the conduct of *campaigns for political office*." *Buckley*, 424 U.S. at 14-15 (emphases added). The most obvious example of political associations are political parties. Political parties are clearly expressive associations and this Court has rigorously protected the associational rights of political parties from various infringements. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Cousins v. Wigoda*, 419 U.S. 477 (1975); *Sweezy*, 354 U.S. 234.

However, the freedom of association extends to all private political associations. In *Buckley*, this Court reaffirmed the constitutional protection for association: "effective advocacy of both *public* and private points of view, particularly controversial ones, is undeniably

enhanced by group association. [Consequently,] the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of *political* beliefs and ideas." 424 U.S. at 15 (emphases added). *See also NCPAC*, 470 U.S. 480; *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

Nor does an expressive association lose its First Amendment rights by incorporating. At least since *First National Bank v. Bellotti*, 435 U.S. 765 (1978), this Court has recognized that the abridgement of the First Amendment rights of corporations demanded strict scrutiny. *Id.* at 786-787. Thus, this Court's cases have turned on whether a sufficiently compelling state interest has been advanced to justify the infringement. In considering the claimed justifications for heightened restrictions on corporations, this Court has distinguished between business corporations and expressive associations. Corporations generally can be limited in their political activity regarding candidate elections, whether in the form of contributions, *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*), or independent expenditures, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), because the attributes of business corporations pose a threat of corrupting the electoral process.

However, because nonprofit ideological corporations pose no such threat, the general corporate ban on political activity cannot be constitutionally applied to them. *MCFL*, 479 U.S. 238. Thus, the decisive issue is whether the corporation is an expressive association.[8] If it is, the

[8]In *NAACP v. Alabama*, the NAACP was objecting to a requirement that the State of Alabama imposed on foreign corporations seeking to qualify to do business in the state. There was no sugges- (continued...)

corporation's political activity cannot be constitutionally limited.

II. Expressive Associations' Political Activity Enjoys High First Amendment Protection, and Because This Case Involves a Prohibited Source Instead of an Amount Limit, Strict Scrutiny Is Required.

Since this case involves the constitutional guarantees of free expression and association, strict scrutiny is required: the government must demonstrate that the regulation is narrowly tailored to advance a compelling governmental interest. *Buckley*, 424 U.S. at 64 ("[A]ction which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."). This highest level of constitutional protection flows from the essential function of expressive associations in allowing effective participation in our democracy for ordinary Americans.

In cases involving limits on the amount of contributions to candidates, this Court has employed only heightened scrutiny, i.e., government must demonstrate that the "contribution regulation was 'closely drawn' to match a 'sufficiently important interest.'" *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 387-88 (2000) (*Shrink*). But as shown below, this case is not about a limitation on *how much* an approved-source entity may make (e.g., $2,000), rather it is about whether a corporation that poses no potential of political corruption is a prohibited *source* of contributions.

The Fourth Circuit employed both levels of scrutiny in this case: strict scrutiny to decide the challenge to

[8](...continued)
tion that the NAACP's incorporated status justified an infringement of its associational rights.

restrictions on independent expenditures and heightened scrutiny to decide the present prohibited source issue. *P.A.* at 2a. As demonstrated by the Fourth Circuit, even under heightened scrutiny, this case should be decided in favor of NCRL. *P.A.* at 24a (rejecting the administrative convenience of a bright line rule as a "sufficiently important interest" because "[t]his formulation requires something more exacting than rational basis review."). However, the proper level is strict scrutiny.

Avoiding form over substance requires a close examination of the reasons why there is a slightly lowered standard of review for limits on contribution *amounts* to see if that rationale is applicable where an organization is deemed to be a prohibited *source* of contributions of any amount.

The cases cited by the government setting a lower standard of scrutiny for contribution limits are applicable only to laws that limit the size of contributions. *See, e.g.*, *Pet. Brf.* at 15-16. While this Court has described limits on the amount of a contribution as imposing only marginal restrictions on contributor's communication, that conclusion was based upon the premise that, "'[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated act of contributing.'" *Shrink*, 528 U.S. at 386 (quoting *Buckley*, 424 U.S. at 21). A limit on the size of the contribution, therefore, "permits the symbolic expression of support evidenced by a contribution." *Id.* at 387 (quoting *Buckley*, 424 U.S. at 21).

However, in the present case, § 441b does not merely limit how much money NCRL can contribute to candi-

dates, it imposes "a substantial restriction"[9] on NCRL's ability to "affiliate . . . with a candidate" or to make even a purely symbolic "general expression of support for the candidate and his views" through a contribution to a candidate. *See Buckley*, 424 U.S. at 21-22. Prohibiting any and all contribution by the corporate entity must be held to the higher scrutiny since even "the symbolic expression of support evidenced by a contribution" is prohibited. *See id.* at 28 (contribution limits "leav[e] persons free . . . to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources"); *Shrink*, 528 U.S. at 398 n.1 (Stevens, J., concurring) (Campaign finance restrictions must be subjected to a higher level of scrutiny where "the prohibition entirely forecloses a channel of

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[9]While § 441b bans corporate contributions, it also establishes the PAC option found inadequate in *MCFL*. 479 U.S. at 251-56; *id.* at 265-66 (O'Connor, J., concurring). The plurality in *MCFL* did not style § 441b's prohibition on corporate independent expenditures a "ban," because of the PAC option, recognizing that "[w]hile [the restriction on use of general funds] is not an absolute restriction on speech, it is a substantial one." *MCFL*, 479 U.S. at 252. Similarly, in *Austin*, this Court viewed Michigan's prohibition on corporate independent expenditures as "not stifl[ing] corporate speech entirely" because the independent expenditures could still be done under a PAC. However, since the PAC option still "burden[s] expressive activity[,] . . . [the prohibition on corporate independent expenditures] must be justified by a compelling state interest."*Austin v. Michigan Chamber of Commerce*, 494 U.S. at 658. This Court still uses the term "ban" when speaking of Michigan's prohibition on corporate independent expenditures, and some members of this Court believe that such a prohibition is rightly styled a "ban." *Id.* at 654 ("The issue before us is only the constitutionality of the State's ban on independent expenditures."), 681 n.* (Scalia, J., dissenting) ("[T]he corporation *as a corporation* is prohibited from speaking." (emphasis in original)), 698 (Kennedy, J., dissenting, joined by O'Connor and Scalia, JJ.) ("The Michigan statute bans [the corporate ad].").

communication. . . . 'The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.'" (quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988))).

Similarly, limits on the associational activities of expressive associations have been found to violate the First Amendment where "the forced inclusion of [the unwanted member] would significantly affect its expression," but similar rules have been acceptable where "the enforcement of these statutes would not materially interfere with the ideas that the organization sought to express." *Boy Scouts*, 530 U.S. at 656-658 (citation omitted). In each case, strict scrutiny was applied.

The present case is about a *ban* on association between an expressive association and a candidate. Consequently, a higher standard of review is appropriate. However, as the Fourth Circuit determined, under either strict or heightened scrutiny, there is no justification for declaring NCRL a prohibited source of contributions absent any potential of political corruption.

III. Expressive Associations That Incorporate for Liability Protection, Not Business Advantage, Lack the Potential for Political Corruption.

For the government, the pro forma key is simple incorporation—if an association is incorporated, that controls, and it can't make contributions. But that is too simplistic. A political action committee (PAC) may incorporate for liability advantage, and PACs may contribute to candidates. 11 C.F.R. § 114.12. So the mere fact of incorporation cannot be the analytical key. It must be the nature of the organization.

The analytical key established by this Court is to reject pro forma analysis of *MCFL*-type corporations and "close[ly] examin[e] . . . the underlying rationale for . . . longstanding regulations." *MCFL*, 479 U.S. at 256-57. Applying this key, the Court held that "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form *per se*, but about the *potential* for unfair deployment of wealth for political purposes. Groups such as MCFL, however, do not pose that danger of corruption." *MCFL*, 479 U.S. at 259 (footnote omitted) (emphasis added).

A. Expressive Associations Incorporate Primarily for Liability Protection, Not Business Advantage.

Nonprofit organizations have only three choices as to form—trust, association, or corporation.[10] The majority of nonprofits are incorporated. Incorporation provides the organization with limited liability for its members, centralized management, and perpetual duration. The law relating to corporations is more defined, and, as a general rule, provides more flexibility in terms of operational guidelines for the nonprofit organization. By contrast, associations generally have no power of perpetual duration, cannot contract, and cannot hold title to property. And trusts are managed by trustees and are governed by state statute, common law, and the provisions of the trust instrument. Marilyn E. Phelan, *Nonprofit Enterprises* § 1:03 (2000).

Although associations and trusts may have the features of centralized management and may also have perpetual duration, limited liability is the uniquely

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[10]The partnership is not an alternative. Partnerships are associations operated for profit. *See* Uniform Partnership Act § 6.

important benefit provided by the corporate form to *MCFL*-type corporations. Because *MCFL*-type organizations gain no advantage in incorporating with respect to (1) taxes (both nonprofit associations and nonprofit corporations are not taxed),[11] (2) business income (business income by a nonprofit corporation is taxed and, if the amount of business income becomes more than de minimis, the nonprofit no longer qualifies as *MCFL*-type corporation), or (3) capital-acquisition from shareholders (it has none), the central attraction for nonprofit organizations to incorporate is to limit liability. *MCFL*, 479 U.S. at 263-64.

Thus, "[w]hile MCFL[-type corporations] may derive some advantages from [their] corporate form, those are advantages that redound to [their] benefit as a political organization, not as a profit-making enterprise. In short, MCFL[-type corporations are] not the type of traditional [corporation] organized for economic gain." *Id.* at 259 (quotation marks omitted). Consequently, there is no potential wealth-enhancing business advantage from the corporate form to corrupt the political system. *Id.*

[11]Business corporations, in contrast, have the tax benefit of shielding income from personal income tax and thereby amassing capital. Historically, this has been an advantage of the corporate form because the corporate income tax was much lower than the personal income tax. So using the corporate form permitted faster accumulation of capital and, as a consequence, using such funds for political purposes was considered unfair and corrupting to the political system. But nonprofit groups do not pay tax, whether or not they are incorporated, so the corporate form provides no advantage in amassing capital for nonprofit groups.

B. *MCFL*-type Expressive Associations Lack the Potential for Political Corruption and Differ in Kind from Business Corporations.

In *MCFL*, this Court decided that an *MCFL*-type corporation has no "potential" for corrupting the political system. *Id.* That issue is already settled and entitled to stare decisis respect. However, the government seeks to demonstrate a corruption potential by resorting to a high level of generality in discussing prior case law. For example, the government speaks often of "political debts," "corruption," and "prophylaxis." *See, e.g., Pet. Brf.* at 2-4.

But the government fails to come to grips with the specific details of alleged corruption, unlike *MCFL* and the Fourth Circuit. Doing so reinforces this Court's holding in *MCFL* that *MCFL*-type corporations pose no potential of threat to the political system. The Fourth Circuit precisely examined the three types of corruption: (1) quid pro quo, (2) monetary influence, and (3) distortion. *P.A.* at 18a-19a, 22a-25a.[12] As shall be seen, the first type is not unique to corporations and is prevented by limits on the amount of contributions and public disclosure. The latter two are not applicable to *MCFL*-type corporations.

1. There Is No Quid Pro Quo Corruption.

In *Buckley*, this Court noted that "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." *Buckley* 424 U.S. at 26-27. Recognizing the

[12]The uncontroverted evidence of this case includes no factual evidence of corruption to the political system by NCRL or any other *MCFL*-type corporation.

cure for the "large contribution" problem in public disclosure and limits on the amount of the contribution, this Court approved "[t]he Act's $1,000 contribution limitation, [which] focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified . . . ." *Id.* at 28.

Under the Bipartisan Campaign Reform Act of 2002 (BCRA), this cure remains intact. 2 U.S.C. § 441a(a)(1) (limit raised to $2,000 to partially account for inflation). The limits apply to any "person," encompassing corporations. 2 U.S.C. § 441a(a)(1) ("No person shall make contributions , . . "); 1 U.S.C. § 431(11) ("The term 'person' includes an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons. . . ."). Thus, the cure for quid pro quo corruption is already in place, and it is certainly more closely tailored to the large contribution problem than making NCRL a prohibited source, as does § 441b.

While "prohibited source" restrictions are rare, the courts have responded, as suggested above, to the claim that quid pro quo corruption justifies a total ban by rejecting it. *See, e.g., Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312, 1323 (9th Cir. 1992) (striking down inter-candidate transfer ban because "[t]he potential for corruption stems not from campaign contributions per se but from large campaign contributions. The inter-candidate transfer ban prohibits small contributions from one candidate to another as well as large contributions."); *Vanatta v. Keisling*, 151 F.3d 1215, 1221 (9th Cir. 1998) (striking down a ban on out-of-district contributions because quid pro quo "corruption stems from large campaign donations and not small ones" and the California ban on out-of-

district contributions "did not distinguish on the basis of size of donation."). A limit on the amount of a contribution may only be properly tailored to quid pro quo corruption if it "focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified." *Buckley*, 424 U.S. at 28. A ban on contributions is not.

Quid pro quo corruption is, of course, not uniquely related to any corporate-form advantage, and there has been no showing that contributions from an *MCFL*-type corporation, such as NCRL, pose a greater danger of corruption than contributions of like size from individuals. Since this Court has "never accepted mere conjecture as adequate to carry a First Amendment burden," *Shrink*, 528 U.S. at 392, this lack of evidence of special need is fatal to the government's attempted justification. As the Fourth Circuit correctly noted, *MCFL*-type corporations are "more akin to an individual or an unincorporated advocacy group than a for-profit corporation" because *MCFL*-type corporations "do not avail themselves of the state-conferred advantages associated with the corporate form, which is the rationale for regulating corporate activity in the first place." *P.A.* at 22a. Consequently, the ban on *MCFL*-type corporate contributions is underinclusive for not banning contributions by "individuals or unincorporated associations [that bear] a strong commitment to an issue or a candidate." *Id.*[13] An underinclusive statute undercuts the govern-

[13]If there were some particular "quid pro quo" corruption problem here because corporate officers were directing the contributions, that problem is not remedied by only allowing corporate contributions through the corporation's PAC. As the government acknowledges, corporate officers also direct contributions to candidates from their (continued...)

ment's claim that it has a special interest in limiting some alleged harm. *Republican Party of Minn. v. White*, 122 S. Ct. 2528, 2537 (2001).

And factually, a pro-life group such as NCRL is among the least likely of all public interest groups to engage in quid pro quo corruption because it would never give money to a legislator who favored abortion rights in an effort to procure a favorable vote on pro-life legislation. There is no evidence that NCRL or any pro-life group has ever made independent expenditures on behalf of such candidates, nor have their PACs ever given money to such candidates. Members would simply not tolerate such action on principle.

2. There Is No Monetary Influence Corruption.

In *National Right to Work Committee*, this Court expressed concern over "war chests" amassed using the special advantages of the corporate form that could be used for political purposes. *NRWC*, 459 U.S. at 207-08. The government has a compelling interest in preventing what the Fourth Circuit called this "monetary influence" type of corruption. *P.A.* at 18a-19a (citing for the classification Thomas Burke, *The Concept of Corruption in Campaign Finance Law*, 14 Const. Comment. 127, 131-33 (1997)); *NRWC*, 459 U.S. at 207-08; *MCFL*, 479 U.S. at 257.

The Fourth Circuit correctly decided, however, that *MCFL*-type corporations "do not avail themselves of the state-conferred advantages associated with the corporate

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[13](...continued)
PAC. *Pet. Brf.* at 3, 17. Corporate officers can equally seek quid pro quo benefits by directing PAC contributions to candidates as by making corporate contributions. Thus, § 441b would also be fatally underinclusive for banning one but not the other.

form, which is the rationale for regulating corporate activity in the first place." *P.A.* at 22a. They rely on donations, not profit. *P.A.* at 22a. Therefore, "[i]t is simply implausible to argue that a small nonprofit accepting individual contributions from like-minded donors poses the same risk to our political order as a Fortune 500 company." *P.A.* at 22a. Furthermore, even though NCRL has taken the corporate form, it "was formed to disseminate political ideas, not to amass capital." *P.A.* at 23a (citing *MCFL*, 479 U.S. at 259). Thus, "[t]he advantages NCRL derives from taking on the corporate form are those 'that redound to its benefit as a political organization, not as a profit-making enterprise." *Id.* (citing *MCFL*, 479 U.S. at 259).

And factually, NCRL has no "war chests" of any sort. As may be readily calculated from the undisputed verified complaint, the total NCRL receipts in 1996, an election year, were $154,637.29. In 1997, they were $155,125.77. In 1998, an election year, they were $118,372.17. *J.A.* at 14-15, ¶¶ 19-23. Out of this annual income, which is less than that of an Associate Justice of this Court,[14] NCRL runs a state-wide public interest organization and provides "reasonable compensation for services rendered to the corporation." *J.A.* at 14, ¶ 14; *see, e.g.*, <http://www.ncrtl.org/> (NCRL's web page).

3. There Is No Distortion Corruption.

In *MCFL*, this Court identified a third concern, that "[t]he resources in the treasury of a business corporation" might not be "an indication of popular support for the corporation's political ideas," *MCFL*, 479 U.S. at 258,

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[14]American Bar Association & Federal Bar Association, *Federal Judicial Pay Erosion: A Report on the Need for Reform* at 19 (App. I) (Feb. 2001).

resulting in "resources amassed in the economic marketplace" that could be used to "unfair advantage in the political marketplace." *Id.* at 257. A related concern is that corporate shareholders or members would have an "economic disincentive for disassociating with [the corporation] if they disagree with its political activity." *Id.* at 264.

The Fourth Circuit recognized, *P.A.* 23a, that this Court has already answered the question about "distortion corruption," deciding that donors contribute to *MCFL*-type corporations "precisely because they support [their] purposes" and because political activity of *MCFL*-type corporations are a "more effective means of advocacy" than trying to advocate alone. *MCFL*, 479 U.S. at 260-61. As the Fourth Circuit aptly phrased it: "There is simply no danger that a nonprofit advocacy group's cause will bear no relation to the beliefs of its contributors and members because the group's *raison d'etre* is to amplify and publicize those beliefs." *P.A.* at 23a.

And factually, "NCRL has engaged in traditional fundraising activities of not-for-profit corporations, such as walk-a-thons and raffles, and engages in minor business activities incidental and related to its advocacy of issues, such as receiving special event revenue from the price of admission to its conventions and revenue from distribution of pro-life literature." *J.A.* at 15, ¶ 25. The percentage received from such "business" activities is "negligible in relation to . . . total revenue." *Id.*

The insubstantial percentage of NCRL's income that comes from business corporations comes overwhelming through an Amerivision long-distance program that permits customers to designate which nonprofit shall receive a contribution from Amerivision equal to 10% of the customer's monthly long-distance charge. Persons who designate NCRL to Amerivision, raise pledges for a

walk-a-thon, buy an NCRL raffle ticket, or pay to attend a NCRL event will clearly understand that the money supports NCRL's cause.[15]

In *MCFL*, this Court specified that an *MCFL*-type corporation must not have "shareholders or other persons affiliated so as to have a claim on its assets or earnings," so that there will be "no economic disincentive for disassociating with it if they disagree with its political activity." *MCFL*, 479 U.S. at 264.

In *Austin*, this Court decided that,

> [a]lthough the Chamber . . . lacks shareholders, many of its members may be . . . reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter.

Austin, 494 U.S. at 663. The Court concluded: "Thus, we are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL in this respect." *Id.*

NCRL has no shareholders. It provides no benefits—no endorsed insurance programs, no credit card program, no loan programs, and no discounts on prescriptions, hotels, rental cars, moving expenses, or similar discounts

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[15]If not, this Court proposed the less restrictive alternative of requiring that people simply be so notified. *MCFL*, 479 U.S. at 261.

on goods and services—unlike many organizations.[16] Thus, NCRL undoubtedly poses no threat of distortion corruption.

4. There Is No Corruption "Potential" Because the *MCFL* Exception Is Self Limiting.

To counter this Court's holdings in *MCFL*, the government emphasizes the corporate "potential" theme, declaring that "all corporations 'receive from the State the special benefits conferred by the corporate structure and present the *potential* for distorting the political process.'" *Pet. Brf.* at 2-3 (quoting *Austin*, 494 U.S. at 661) (emphasis added).

But as already noted, this Court has held that not "all corporations" pose this "potential for distorting the political process." "Groups such as MCFL . . . do not pose [the] danger" of "the *potential* for unfair deployment of wealth for political purposes." *MCFL*, 479 U.S. at 259 (emphasis added).

So this Court in *Austin* clearly was not thinking of its already established holding in *MCFL* when it spoke of "*all* corporations," and consequently this "*potential* for distorting the political process" has no bearing on *MCFL*-type corporations and the present case. A fuller quote from *Austin* demonstrates that this Court was considering "closely held corporations" without much capital, and clearly "all" *business* corporations *do* have the "potential" to use the corporate form for amassing capital:

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[16] *Compare* <http://www.ncrl.org> (NCRL website) *with* <http://www. aarp.org> (AARP website, "Member Services and Discounts") *and* <http://www.nrahq.org/givejoinhelp/membership/benefits.asp> (NRA website, "Benefits & Special Offers").

> The fact that [the Michigan statute barring independent expenditures] covers closely held corporations that do not possess vast reservoirs of capital does not make it substantially overinclusive, because all corporations receive the special benefits conferred by the corporate form and thus present the potential for distorting the political process.

Austin, 494 U.S. at 653 (citing for comparison *NRWC*, 459 U.S. at 209-210). Thus, all business corporations, including closely held corporations have the potential for accumulating "war chests," even if they do not currently have them. But since *MCFL*-type corporations do not use the corporate form to amass capital, the "all corporations" statement could not encompass them.[17]

The reason there is no "potential for distorting the political process" is that the *MCFL* exception is self-limiting. If an *MCFL*-type corporation begins generating or receiving substantial business income or business corporation contributions, by definition, it automatically is no longer an *MCFL*-type corporation. *MCFL*, 479 U.S. at 263-64. If it acquires shareholders or members who have an economic disincentive to disassociate, it no longer qualifies as an *MCFL*-type corporation. If political activity becomes the "major purpose" of an *MCFL*-type corporation, it automatically ceases to be an *MCFL*-type corporation and must register and report as a political action committee. *Id.* at 262.

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[17] Similarly broad language was used in *NRWC*, but again the broad language was not focusing on the unique characteristics of *MCFL*-type corporations. Rather, it was focusing on the difference between corporations "without great financial resources" and "those more fortunately situated." *NRWC*, 459 U.S. at 210.

Nothing else has to happen for an *MCFL*-type corporation to cease being an *MCFL*-type corporation than to cease fitting the definition—then it transmogrifies as instantly as fairy tale coaches revert to pumpkins at midnight.

The Fourth Circuit's decision also does not conflict with this Court's decision in *NRWC*. In *NRWC*, this Court held that the "members" whom a corporation could solicit for PAC contributions under § 441b did not include "the 267,000 individuals solicited by NRWC during 1976." 459 U.S. at 205. This was so, this Court decided, because these alleged "members" "play no part" in administration, elect no officials, exercised no "control over expenditure of their contributions," and were "explicitly disclaimed" as existing in the "articles of incorporation and other publicly filed documents." *Id.* at 206. Consequently, this Court held that "those solicited were insufficiently attached to the corporate structure of NRWC to qualify as 'members' under the statutory proviso." *Id.*

In this context, the Court spoke broadly and favorably about the history and justification for regulation of the "political contributions and expenditures of corporations and labor unions," on the basis that "the special characteristics of the corporate structure require particularly careful regulation," *NRWC*, 459 U.S. at 209-10, and "rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." *NCPAC*, 470 U.S. at 500. Nothing in the present case undermines the justification for regulation of business corporations and labor unions or of nonprofits

that "serve as a conduit for corporate political spending." *Austin*, 494 U.S. at 664.[18]

However, just as this Court in *NRWC* recognized that "the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process,'" *id.* at 210 (citing *California Medical Association v. FEC*, 453 U.S. 182, 201 (1982)),[19] this Court, when faced for the first time with the claim for an exemption from the general ban on corporate political activity in *MCFL*, examined the "differing structures and purposes" of nonprofit ideological corporations founded to advocate political ideas and found that, as long as they did not serve as conduits for business corporation contributions,

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[18] In *MCFL*, this Court noted that the constitutionality of applying § 441b to business corporations remained an open issue before it, although the Court had settled whether § 441b was constitutional as applied to *MCFL*-type corporations:

> We acknowledge the legitimacy of Congress's concern that organizations that amass great wealth in the economic marketplace do not gain unfair advantage in the political marketplace. Regardless of whether that concern is adequate to support application of § 441b to commercial enterprises, *a question not before us*, that justification does not extend uniformly to all corporations.

MCFL, 479 U.S. at 263 (emphasis added). *Accord, Mariani v. United States*, 212 F.3d 761, 769 (3d Cir. 2000) (en banc) ("[T]he facial validity of [§ 441b] never has been squarely determined by the Supreme Court.").

[19] *See also Bellotti*, 435 U.S. at 825 n.5 (Rehnquist, J., dissenting) ("However, where a State permits the organization of a corporation for explicitly political purposes, this Court has held that its rights of political expression, which are necessarily incidental to its purposes, are entitled to constitutional protection. *NAACP v. Button*, 371 U.S. 415, 428-429 (1963). . . . [N]othing in *Button* requires that similar protection be extended to ordinary business corporations.").

they did not pose the threat of corruption that business corporations did at all. As a result, the general ban on corporate political activity cannot be constitutionally applied to *MCFL*-type corporations.

C. The Practical Effect Will Be Minimal.

As this Court noted in *MCFL*, "[i]t may be that the class of organizations affected by our holding today will be small. That prospect, however, does not diminish the significance of the rights at stake." *MCFL*, 479 U.S. at 264. Not only is the class of *MCFL*-type corporations small, but the case below was decided only as-applied to NCRL, a small organization that has a small budget, is dedicated to serving the common good, and provides no monetary benefits to its members. *P.A.* at 30a.

Consequently, this case does not even involve a concern of systemic political corruption by the aggregation of many contributions from *MCFL*-type corporations. That issue, should it ever arise, is not ripe in this case and should await another day, if ever. But that day is unlikely to come because expressive associations are generally small and do not have extra money lying around from their bake sales to make large or numerous contributions. And there is no evidence in this case of any such problem.

This Court dismissed similar concerns in *MCFL* with respect to independent expenditures. The FEC had maintained that exempting *MCFL*-type corporations from the independent expenditure ban "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions." 479 U.S. at 262. This Court responded: "We see no such danger." *Id.* And there is no evidence that such a problem has developed.

Nor will corporate contributions be undisclosed. Federal election law requires candidates to report the identity of contributors over $200, 2 U.S.C. § 434(b)(3)(A), including any "contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate." 2 U.S.C. § 441a(a)(8). Consequently, as the Fourth Circuit declared, this case represents a "step [that is] cautious and modest." *P.A.* at 34a.

D. Absent Corruption, There Should Be No Deference to Desire for Broad Prophylaxis.

The government repeatedly urges form over substance by imploring this Court to defer to the congressional determination of the need for a broad prophylactic rule. *See, e.g., Pet. Brf.* at 4.

But putting form over substance is exactly what this Court refused to do in *MCFL*, where it decided that, with respect to *MCFL*-type corporations, any "reli[ance] on the long history of regulation of corporate political activity" "requires close examination of the underlying rationale for this longstanding regulation." *MCFL*, 479 U.S. at 256-57. This is so because this Court held that *MCFL*-type corporations differ in kind, not degree, from other corporations:

> [T]he concerns underlying the regulation of corporate political activity are simply absent with regard to MCFL. The dissent is surely correct in maintaining that we should not second-guess a decision to sweep within a broad prohibition activities that differ in *degree*, but not *kind*. Post, at 268-269. It is not the case, however, that MCFL merely poses less of a threat of the danger that has prompted regulation. Rather, it does not pose

> such a threat at all. Voluntary political associations do not suddenly present the specter of corruption merely by assuming the corporate form.

MCFL 479 U.S. at 263 (emphases added).

In fact, *MCFL* expressly rejected the prophylactic approach with respect to *MCFL*-type corporations engaging in free expression and association: "Where at all possible, government must curtail speech only to the *degree necessary to meet the particular problem at hand*, and must avoid infringing on speech that does not pose the danger that has prompted the regulation." 479 U.S. at 265 (emphasis added). *See also NCPAC*, 470 U.S. at 501 ("We are not quibbling over fine-tuning of prophylactic limitations, but are concerned about wholesale restrictions of clearly protected conduct.").

In the present case, the question of whether NCRL is a prohibited source for contributions must start with an appropriate constitutional analysis, as this Court held it must do in *MCFL*, and ask whether NCRL poses any potential for corrupting the political process that makes it a prohibited source for contributions. Deference to the desire for a broad prophylactic rule on this issue at the core of constitutional protection afforded free expression and association is inappropriate. *Id.* at 256-57. *See also NAACP v. Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (citations omitted)).

E. *MCFL* Is Entitled to Stare Decisis Respect.

There is no reason here to disregard stare decisis application of *MCFL*'s analytical key (of examining the true nature of a corporation) and its holding that

MCFL–type corporations pose no potential of corruption to the political system.[20] Neither has been "undermined by subsequent changes or development in the law." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). *MCFL* and its reasoning have not proven "positive detriment[s] to coherence and consistency in the law" because their "conceptual underpinnings" have been weakened or because "later law has rendered [them] irreconcilable with competing legal doctrines or policies." *Id.* (citations omitted). Nor has *MCFL* or its reasoning become "outdated after being 'tested by experience'" or "found to be inconsistent with the sense of justice or with the social welfare." *Id.* (citations omitted).

As Chief Justice Rehnquist has stated for the Court, stare decisis is "a cornerstone of our legal system," *Webster v. Reproductive Health Services*, 492 U.S. 490, 518 (1989), that promotes "the evenhanded, predictable, and consistent development of legal principles, reliance on judicial decisions, and the actual and perceived integrity of the judicial process," and it strongly counsels against reconsidering precedent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)) (ellipses omitted).

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[20]This Court in *MCFL* distinguished *NRWC* on the handy point that *NRWC* had dealt with contributions, while *MCFL* dealt with independent expenditures, 479 U.S. at 259, but that was not the holding of the Court because the issue presented by the present case was not before the Court. *Cf. Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) ("This Court is bound by holdings, not language."). When the present case squarely presented the corporate contribution issue, the Fourth Circuit properly looked to the analysis of this Court in *MCFL* and held that the logic of *MCFL* requires an exemption from the corporate contribution ban for *MCFL*-type corporation. *See also infra* at Part IV.A.1.

Even in constitutional cases, stare decisis "carries such persuasive force" that this Court always requires "special justification" to depart from precedent. *Dickerson v. United States,* 530 U.S. 428, 443 (2000) (quoting *United States v. International Business Machines Corp.,* 517 U.S. 843, 856 (1996)). There is no "special justification" for overruling *MCFL.* Subsequent decisions have not undermined *MCFL.* To the contrary, they have relied and built upon it. *See FEC v. National Rifle Ass'n,* 254 F.3d 173, 192 (D.C. Cir. 2001); *North Carolina Right to Life v. Bartlett,* 168 F.3d 705, 714 (4th Cir. 1999); *Minnesota Concerned Citizens for Life v. FEC,* 113 F.3d 129, 130 (8th Cir. 1997); *FEC v. Survival Educ. Fund, Inc.,* 65 F.3d 285, 292-93 (2d Cir. 1995); *Day v. Hollahan,* 34 F.3d 1356, 1363-65 (8th Cir. 1994).

MCFL was not "a solitary departure from established law," *Seminole Tribe,* 517 U.S. at 66; rather, it was a logical extension of established law. It has proven to be a workable and well-reasoned decision, *Payne,* 501 U.S. at 828-30, and it has not created any confusion in the lower courts, even if there has been some minor difference in applying its principles.[21] It's analytical key of examining

[21]The minor difference is over the amount of business income and business corporation contributions that a nonprofit corporation can receive and still qualify as an *MCFL*-type corporation. All Circuits reject the FEC's position that, if a group receives any business income or business corporation contributions, it doesn't qualify, and these courts have permitted such income and contributions, as long as they were "de minimis" and not "substantial." *See NRA,* 254 F.3d at 192; *MCCL,* 113 F.3d at 130; *Day,* 34 F.3d at 1363-65; *NCRL,* 168 F.3d at 714; *Survival Educ. Fund,* 65 F.3d at 292. The Second and Eighth Circuits agree with the court below that one looks at the percentage of revenue: if it is "modest," a group qualifies. *P.A.* at 21a. The D.C. Circuit looks to the absolute amount received: if $1,000, the group qualifies, but $7,000 is too much. *NRA,* 254 F.3d at192. This dispute, (continued...)

the true nature of a corporation and its no-potential-for-corruption rationale should be followed and applied as the Fourth Circuit did.

IV. *MCFL*-Type Corporations Are Not a Prohibited Contribution Source.

As will be seen in this Part, applying the facts of this case to either a strict or heightened scrutiny analysis, it is apparent that making NCRL a prohibited source of contributions is constitutionally prohibited, and the government's suggested alternatives for NCRL fail constitutional scrutiny.

A. Under the Facts and Constitutional Standard, NCRL Is Not a Prohibited Source of Contributions.

Whether this Court applies strict or heightened scrutiny, a "close examination of the underlying rationale" requires the government to demonstrate more than a rational-basis desire for a uniform rule for all corporations. *P.A.* at 24a-25a. The government must demonstrate that NCRL poses the potential for political corruption that justifies the ban on business corporation contributions in § 441b. The government must prove next that the ban (as opposed to a limit on the amount of contributions) is either narrowly or closely tailored to effectuate that interest. As shown below, the government fails on both counts.

[21](...continued)
however, is not before this Court, since the government did not appeal this issue. *Pet. Brf.* at 6 n.3.

1. Absent Potential for Corruption, There Is No Compelling or Sufficient Interest.

Do *MCFL*-type corporations possess the potential for political corruption? This Court in *MCFL* made clear that *MCFL*-type corporations are not a prohibited source because they do not "merely pose[] less of a threat of the danger that has prompted the regulations. Rather [they] do[] not pose such a danger at all." *MCFL*, 479 U.S. at 263. The "danger" of course, was the "*potential* for unfair deployment of wealth for corporate purposes," and this Court held that "[g]roups such as MCFL . . . *do not pose that danger of corruption.*" *Id.* at 259 (emphasis added).

NCRL has no such potential. It "was formed for the express purpose of promoting political ideas," *MCFL*, 479 U.S. at 264,[22] it does not amass war chests with the benefit of the corporate form, and its political activity will not distort the political system. Should it change, it would instantly cease being an *MCFL*-type corporation and would no longer be entitled to the exemption from the corporate ban on political activity recognized in *MCFL*.

Nor does the fact that contributions are involved here, rather that independent expenditure as in *MCFL*, affect the analysis. Both "implicate fundamental First Amendment interests." *Buckley*, 424 U.S. at 23. But more importantly, it is not the specific activities that are in question, as long as they are protected by the First Amendment, but the nature of the group that wants to do the activity. *See Austin*, 494 U.S. at 671 n.3 ("Whether an

[22]There is no doubt here that as a "threshold" matter, NCRL "is an association whose activities or purposes should engage the strong protections that the First Amendment extends to expressive associations . . . [because it is] engaged exclusively in protected expression." *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring).

organization presents the threat at which the campaign finance laws are aimed has to do with the particular characteristics of the organization at issue and not with the content of its speech. Of course, if a correlation between the two factors could be shown to exist, a group would be free to mount a First Amendment challenge on that basis."); 660 ("Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."); 678 (Stevens, J., concurring) ("In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley v. Valeo*, 424 U.S. 1, 45-47, . . . should have little, if any, weight in reviewing corporate participation in candidate elections."); *MCFL*, 479 U.S. at 270 (Rehnquist, C.J., concurring in part and dissenting in part) ("[The fact that *NRWC* involved contributions and *NCPAC* involved independent expenditures] is admittedly a distinction between the facts of *NRWC* and those of *NCPAC*, but it does not warrant a different result in view of our longstanding approval of limitations on corporate spending and of the type of regulation involved here. The distinction between contributions and independent expenditures is not a line separating black from white.").

Here, we have an expressive association that poses no threat of corrupting the political process. Because the group poses no such threat, there is no interest in prohibiting any of its political activity.

So what interest is left? As the Fourth Circuit noted, absent any potential for political corruption, the government is left with the desire for a bright-line rule in support of making NCRL a prohibited source of contributions. The Fourth Circuit rejected a bright-line rule as sufficient justification, *P.A.* at 24a-25a, noting that this

Court likewise refused to do so in *MCFL*. 479 U.S. at 263 ("[t]he rationale for restricting core political speech in this case is simply the desire for a bright-line rule. This hardly constitutes the *compelling* state interest necessary to justify any infringement on First Amendment freedom.") (emphasis added).

As the Fourth Circuit noted, "[a]lthough administrative convenience constitutes a legitimate state interest where rational basis scrutiny . . . is involved, such convenience is insufficient to justify state action that triggers any level of heightened scrutiny." *P.A.* at 24a (citing *Craig v. Boren*, 429 U.S. 190, 198 (1976)). The Fourth Circuit correctly noted that the applicable level of scrutiny in this case "requires something more exacting than rational basis review." *P.A.* at 25a. This rational basis level justification fails both heightened and strict scrutiny.

2. The Prohibited Source Ban Is Not Closely Drawn to Any Anti-Corruption Interest.

Because scrutiny of a contribution ban must be greater than that accorded to mere limits on the amount of a contribution, the anti-corruption rationale that justifies contribution *limits* does not justify the greater First Amendment burden posed here. However, a complete ban even fails close tailoring under the contribution limit standard since its impact is far greater than necessary to address the government's legitimate concerns that stem from "large financial contributions." *NRWC*, 459 U.S. at 208.

In sum, there is no justification for making NCRL a prohibited source, and the prohibition itself is neither narrowly nor closely tailored to any valid governmental corruption interest.

B. Suggested PAC and Independent Expenditures Alternatives Fail Constitutional Mandate.

The government suggests that § 441b's corporate contribution ban poses a "relatively small burden" on NCRL because NCRL may make contributions through its PAC and because NCRL may make independent expenditures as an *MCFL*-type corporation.[23] *Pet. Brf.* at 17.

Factually, the PAC alternative is as problematic for NCRL as it was for MCFL. The argument that a PAC alternative is sufficient was already dealt with in *MCFL* 479 U.S. at 252-56 (plurality opinion); *id.* at 266 (O'Connor, J., concurring), was well summarized by the

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[23]The government correctly concedes that NCRL is an *MCFL*-type corporation, which fact was found by the lower courts and which issue the government concedes was not presented for review by this Court. *See supra* note 2. However, it then brazenly attempts a collateral attack on this finding with inconsistent arguments.

The government first tries to draw a distinction between MCFL and NCRL by highlighting the fact that "NCRL does not have . . . a policy" against accepting corporate contributions. *Pet. Brf.* at 21. It returns to this theme in discussing *Austin*, noting that "the Chamber did not have a policy against accepting contributions from business corporations and thus, 'could, absent application of [the state law], serve as a conduit for corporate political spending.'" *Pet. Brf.* at 24 n.10 (citation omitted).

Finally, the government goes beyond innuendo and argues that this Court's *MCFL* no-corruption rationale concerning independent expenditures could not be extended to contributions by NCRL because "NCRL . . . does not have a policy against accepting contributions from traditional business corporations" and thus could become a "conduit." *Pet. Brf.* at 29-30. Not only is this argument erroneous because an *MCFL*-type corporation that becomes a "conduit" for business corporation contributions instantly ceases to be an *MCFL*-type corporation, but it is beyond the permitted scope of argument under the certiorari grant and should be disregarded. Rule 24.1(a) ("brief may not raise additional questions").

Fourth Circuit, *P.A.* at 13a-16a, and merits little discussion time here. In short, that the PAC can make contributions is not the same as NCRL being able to make contributions. There are special burdens that attach to the PAC option. These are decisive even if the corporation already has a PAC in place. *MCFL*, 479 U.S. at 255 n.8 (plurality opinion); *id.* at 266 (O'Connor, J., concurring).

But the burden of segregating political activity into a PAC is greater than the administrative burden and affects the quantity of funds raised. First, because only "members" may be solicited for PAC purposes, the universe of persons who can be solicited for contributions is smaller that the group's donors. *MCFL*-type corporations with few or no members would be unable to speak. *MCFL*, 479 U.S. at 242 & n.1 (broad definition of "member" meant that MCFL had no "members" to solicit for PAC contributions), 255 (plurality opinion), 266 (O'Connor, J., concurring).

Second, there is the "free rider" effect. Where a member of a group will benefit from a group's action, a member may

> conclude that, if everyone else contributes . . . , his or her own contribution will have a negligible effect . . . [o]r, . . . if no one else contributes, only a negligible amount of the good will be produced. [Thus,] . . . he or she is better off, no matter what others do, if he or she makes no contribution. Such strategic behavior, know as free riding, will cause voluntary contributions for collective goods to understate the actual support for their production.

Alan J. Meese, *Limitations on Corporate Speech: Protection for Shareholders or Abridgment of Expression?*, 2 Wm. & Mary Bill Rts. J. 305, 319 (1993). This is true of

solicitations for corporate PACs and "the difference represents a substantial quantity of speech." *Id.* at 324.

Finally, the PAC option actually involves, from the perspective of the nonprofit corporation, the creation of a new and distinct organization, with its own separate "political" identity, a new organization which the group, for the reasons expressed above, may not wish to create.[24] Interestingly, of the twelve most effective nonprofit advocacy groups recently identified and studied by The Aspen Institute, only three had PACs. Susan Rees, *Effective Nonprofit Advocacy* 5 (1998) (Working Paper Series, Nonprofit Sector Research Fund, The Aspen Institute). Obviously, for reasons important to them, they have declined to exercise the PAC option.

Furthermore, the PAC option is not independently justified, as it was in *Austin*. In *Austin*, this Court found that, unlike MCFL which "was formed for the express purpose of promoting political ideas," the Michigan Chamber of Commerce engaged in activities that "are not inherently political." 494 U.S. at 622 (citations omitted). Thus, requiring the Michigan Chamber to put its independent expenditure under it PAC ensures that the funds used "in fact reflect popular support for the political positions of the committee." *Id.* (citations omitted). However, since NCRL's support is generated because it

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[24]It should be obvious that "the more restrictive the range of purposes [nonprofit] organizations can serve, the less likely organizational entrepreneurs are to come forward to establish them and therefore the smaller the nonprofit sector we can expect. Thus, for example, restrictions on the political or advocacy activities of nonprofit organizations can discourage some 'political entrepreneurs' from the nonprofit field." Lester M. Salamon & Stefan Toepler, *The Influence of the Legal Environment on the Development of the Nonprofit Sector* 8 (2000) (Johns Hopkins Center for Civil Society Studies, Working Paper Series, No. 17).

"was formed for the express purpose of promoting political ideas," *id.*, the PAC option serves no such purpose and, thus, "may be unconstitutional as applied to some corporations because they do not present the dangers at which the expenditure limitations are aimed." *Id.* at 671 (Brennan, J., concurring).

The government's argument that the contribution ban places little constitutional burden on NCRL because NCRL can do something else, i.e., make independent expenditures, is novel but equally ineffective. *Pet. Brf.* at 17.

At one level, the argument is answered by *MCFL*'s holding that telling MCFL it could do something else (in that case, make independent expenditures through a PAC) was inadequate. And the First Amendment protects NCRL's right both to advocate and to choose its means of advocating. *Meyer*, 464 U.S. at 424 ("The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."). But the government's argument also erroneously assumes that contributions and independent expenditures are fungible. They are not.

For example, imagine a campaign in which there are two candidates for federal legislative office in North Carolina. Neither is closely aligned with NCRL on the life issues. However, Candidate X is notably worse than Candidate Y from NCRL's perspective. NCRL wants to promote its issues by encouraging the election of what it considers the lesser of two evils. Giving a contribution to Y, however, is out of the question because a contribution represents an association and identification with a candidate, implying endorsement. Y is not pro-life and so NCRL cannot contribute to him. But NCRL can make independent expenditures for advertisements opposing X without so identifying with Y through a contribution.

Similarly, NCRL may want to contribute to a candidate precisely because of the symbolic identification factor, even though NCRL does not want to spend the funds necessary to run an effective independent expenditure campaign in support of the candidate.

In sum, the notion that NCRL shouldn't be able to do what it wants to do because it can do something else fails. Where a corporation poses no potential for political corruption, it is wrong to ban activity on the basis of the missing potential and then try to justify the ban by telling the corporation it can just do something else.

CONCLUSION

Pro forma prophylaxis is unnecessary absent disease. *MCFL*-type expressive associations pose no potential for corruption to the political system, so there is no justification for the corporate ban in § 441b as applied to NCRL. Substance should triumph over form. The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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No. 02-403

In the Supreme Court of the United States

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CHRISTINE BEAUMONT, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Regan v. *Taxation Without Representation*, 461 U.S. 540 (1983) 15
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2 U.S.C. 441b ..... *passim*
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Robert Paul Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. Pa. L. Rev. 971 (1999) 14

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Report of Special Comm. to Investigate Campaign Expenditures, H.R. Rep. No. 2739, 79th Cong., 2d Sess. (1946) 9
Senate Comm. on Governmental Affairs, Investigation of Illegal or Improper Activities on Connection with 1996 Federal Election Campaigns: Final Report, S. Rep. No. 167, 105th Cong., 2d Sess. (1998) 17

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Despite their repeated invocation of stare decisis, respondents' position is out of step with more than a quarter-century of this Court's campaign-finance jurisprudence. In arguing that the prohibition on direct contributions by "any corporation whatever" (2 U.S.C. 441b(a)) is unconstitutional as applied to respondent North Carolina Right to Life, Inc. (NCRL), respondents urge the Court to disregard the basic distinction that it has repeatedly drawn between the regulation of independent election expenditures and campaign contributions, and the rationale of *FEC* v. *National Right to Work Committee* (*NRWC*), 459 U.S. 197 (1982). But respondents provide no persuasive reason for the Court

to uproot its case law, much less to second-guess a legislative judgment that the Court has long accepted concerning the need for "prophylactic measures" (*id.* at 210) to insulate federal elections from the fact or appearance of corruption associated with corporate contributions.

A. Respondents' Position Cannot Be Squared With This Court's Existing Precedents

1. Respondents urge (Br. 18) this Court to give "stare decisis respect" to *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238 (1986), but at the same time show scant respect either for the foundation on which *MCFL* is built or the Court's specific statements in *MCFL* limiting its holding and distinguishing prior precedent. In *MCFL*, this Court held that Section 441b's prohibition on independent *expenditures* violates the First Amendment as applied to a nonprofit advocacy corporation. The FEC has not challenged in this Court the court of appeals' fact-specific finding that NCRL qualifies for the exemption created by *MCFL* with respect to independent expenditures. But the fact that NCRL is exempt from the prohibition on independent expenditures does not lead to the conclusion that it is entitled to a First Amendment exemption from Section 441b's prohibition on direct campaign contributions. See Gov't Br. 21-23.

In *MCFL*, the Court took care to square its decision with the Court's unanimous decision four years earlier in *NRWC*. See *MCFL*, 479 U.S. at 259-260. In *NRWC*, the Court upheld an FEC determination that a nonprofit advocacy corporation violated Section 441b by soliciting funds from nonmembers to make campaign contributions through a PAC. 459 U.S. at 201-206. In so holding, however, the Court in *NRWC* carefully

examined the prohibition on direct *contributions* by corporations. *Id.* at 208-210. In doing so, the Court not only emphasized that Congress's judgment as to how "to account for the particular legal and economic attributes of corporations * * * warrants considerable deference," but also "accept[ed]" Congress's judgment that the "potential" for corruption in this context justifies Section 441b's prohibition on contributions by all corporations—including corporations, like the nonprofit advocacy corporation in *NRWC*, "*without* great financial resources." *Id.* at 209-210 (emphasis added).

Led by the Chief Justice, the four dissenting Justices in *MCFL* argued that *NRWC* foreclosed any "effort to carve out a constitutional niche for '[g]roups such as MCFL.'" *MCFL*, 479 U.S. at 271 (dissent); see *id.* at 268-271. As respondents note (Br. 31), the dissenting Justices questioned whether the differences between expenditures and contributions were sufficient to distinguish *NRWC*. The Court's response was an analytical lynchpin of the *MCFL* decision. The Court explicitly acknowledged *NRWC*, noted that "the political activity at issue in [*NRWC*] was *contributions*," and explained that the Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on *independent spending*." *Id.* at 259-260 (emphases added). Moreover, the Court explicitly *reaffirmed* the rationale of *NRWC*: "In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in [*NRWC*]." *Id.* at 260. But, given the heightened First Amendment interests involved in independent expenditures, the Court concluded that "the desirability of a broad prophylactic rule cannot justify treating alike [all

corporations] in the regulation of *independent spending*." *Ibid.* (emphasis added).

2. Respondents' attempts to distinguish *NRWC* are unavailing. Respondents acknowledge (Br. 32 n.20) that "[t]his Court in *MCFL* distinguished *NRWC* on the handy point that *NRWC* had dealt with contributions, while *MCFL* dealt with independent expenditures." But that distinction was not simply "handy." It is one of the central tenets carved by the past quarter-century of this Court's campaign-finance jurisprudence. See *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 440-443 (2001); *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 386-389 (2000); *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 610 (1996); *MCFL*, 479 U.S. at 259-260, 261-262; *FEC* v. *National Conservative Political Action Comm.* (*NCPAC*), 470 U.S. 480, 495-496 (1985); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 196-197 (1981); *Buckley* v. *Valeo*, 424 U.S. 1, 20-22 (1976) (per curiam). Furthermore, as explained (Gov't Br. 15-16), that distinction is supported by the fact that (1) limits on independent expenditures "impose significantly more severe restrictions on protected freedoms of political expression and association" than limits on contributions, and (2) independent expenditures do not present the same inherent threat of corruption as contributions. *Buckley*, 424 U.S. at 23; see *Nixon*, 528 U.S. at 386-389.[1]

[1] In the particular context of *MCFL*-type corporations, limits on expenditures may prevent individuals who individually could not afford to finance a particular form of election speech from pooling their assets to do so. In the contribution context, the ability to pool resources does not enable individuals to make contributions they could not otherwise make, except to the extent that they circumvent limits on individual contributions. See *infra*.

Respondents acknowledge the "broad language * * * used in *NRWC*" (Br. 26 n.17) in discussing the constitutionality of the prophylactic ban on direct contributions by corporations (see *NRWC*, 459 U.S. at 208-210), but nonetheless maintain that the Court's discussion in *NRWC* does not apply to nonprofit advocacy corporations like respondent NCRL. That is incorrect. The nonprofit advocacy corporation in *NRWC* was analogous to the one in *MCFL*, see *MCFL*, 479 U.S. at 269 (dissent), and thus to NCRL. Moreover, both *NRWC* and this Court's subsequent decisions, including *MCFL*, directly refute respondents' narrow reading of *NRWC*. See *NRWC*, 459 U.S. at 210 (recognizing that Section 441b's prophylactic rule against contributions applies to "corporations * * * *without* great financial resources") (emphasis added); *NCPAC*, 470 U.S. at 500 ("In *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, *membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit.*") (emphasis added); *MCFL*, 479 U.S. at 260 (acknowledging *NRWC*'s endorsement of "a broad prophylactic rule" for contributions); *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990) (discussing *NRWC*).

Adopting respondents' reading of *NRWC* would do violence to the Court's case law. In particular, it would require the Court to disregard the key distinction that it drew in *MCFL* with respect to *NRWC*, 479 U.S. at 259-260; to disavow its decision in *NRWC* to "accept" Congress's judgment that a broad prophylactic rule against corporate contributions is justified by the threat of actual or apparent corruption, 459 U.S. at 210,

and its reaffirmance of the rationale of *NRWC* in subsequent decisions such as *NCPAC*, 470 U.S. at 500, *MCFL*, 479 U.S. at 260, and *Austin*, 494 U.S. at 661; and to unravel decades' worth of precedent distinguishing between the regulation of campaign contributions and independent expenditures, see p. 4, *supra*. Yet respondents have not come close to establishing the sort of "special justification" that this Court requires before undoing its precedents, *United States* v. *IBM*, 517 U.S. 843, 856 (1996); see *Agostini* v. *Felton*, 521 U.S. 203, 235-236 (1997); Resp. Br. 33-34, and there is no basis for the Court to depart from, much less overturn, its prior precedents here.[2]

3. Nor is there any reason for this Court to abandon its differential treatment of expenditures and contribution limits. Respondents argue (Br. 13) that "strict scrutiny is required" in this case. The Court does apply strict scrutiny to restrictions on election expenditures. See *Austin*, 494 U.S. at 657; *Buckley*, 424 U.S. at 44-45. But, as the Court reiterated just three Terms ago in rejecting the application of strict scrutiny to contribution limits, "under *Buckley*'s standard of scrutiny, a contribution limit involving 'significant interference' with associational rights could survive if the

[2] Respondents' own amici acknowledge "this Court's prior acceptance of Congress' 'corruption' rationale for prohibiting campaign contributions by corporations," but argue that such acceptance "should be re-evaluated" in light of the Court's decision last Term in *Republican Party* v. *White*, 122 S. Ct. 2528 (2002). Br. for Amici RealCampaignReform.Org, Inc. *et al.*, 5. *White*, however, did not involve any challenge to a contribution or even expenditure limit, and the Court accordingly did not discuss the principles or precedents concerning the regulation of corporate campaign contributions. Nothing in *White*, therefore, sanctions the sort of reevaluation urged by amici in this case.

Government demonstrated that contribution regulation was a means 'closely drawn' to match a 'sufficiently important interest.'" *Nixon*, 528 U.S. at 387-388 (citation omitted; quoting *Buckley*, 424 U.S. at 25). Indeed, in *MCFL*—the case on which respondents principally rely and to which they urge continuing adherence—the Court specifically stated that "[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." 479 U.S. at 259-260.[3]

Respondents suggest (Br. 16) that "the nature of the organization," not the nature of the political activity, is the "analytical key" to this case. But this Court's precedents, including *MCFL* itself, reject that analysis. The "nature of the organization" in *MCFL* was comparable to the one in *NRWC*—both were "nonprofit corporation[s] without capital stock, formed to educate

[3] Respondents suggest (Br. 14) that the fact that this case involves a prohibition, rather than a limit, on contributions itself calls for strict scrutiny. To begin with, Section 441b does not establish an absolute ban on corporate contributions because corporations may still contribute through a PAC. See Gov't Br. 30; see also *MCFL*, 479 U.S. at 252 (recognizing that because of possibility of expenditures through a PAC, Section 441b's expenditure provision "is not an absolute restriction"); *Austin*, 494 U.S. at 660. In any event, the key distinction drawn by this Court's cases is not between limits and bans, but rather focuses on the different expressive activity involved in making contributions and making independent expenditures. See *Nixon*, 528 U.S. at 386-389. In *MCFL*, in the particular context of Section 441b, the Court emphasized that the restriction on contributions at issue in *NRWC* was subject to a less demanding inquiry than the restriction in *MCFL* on independent expenditures. See *MCFL*, 479 U.S. at 259-260. And both *MCFL* and *NRWC* involved Section 441b's *prohibition* on direct election activities by corporations, subject to the ability of corporations to conduct such activities through PACs.

the public on an issue of perceived public significance." *MCFL*, 479 U.S. at 269 (dissent). Yet in *MCFL* the Court specifically distinguished *NRWC*, explaining that "the *political activity* at issue in [*NRWC*] was contributions," not independent expenditures, and that "restrictions on contributions require less compelling justification than restrictions on independent spending." *Id.* at 259-260 (emphasis added).

B. Respondents Provide No Reason To Second-Guess Congress's Judgment As To The Need For A Prophylactic Rule

Treating this case as if the Court were working off a blank slate, respondents urge this Court to reject Congress's determination to adopt a broad prophylactic rule barring contributions by all corporations, including nonprofit advocacy corporations. See Br. 18-29. But that legislative judgment is entitled to as much respect today as it was when the Court accepted it in *NRWC*.

1. In addressing the potential for corporate corruption of the political process, Congress historically has treated all who choose to take advantage of the benefits of the corporate form alike. The Congress that first enacted the prohibition on corporate contributions in 1907 rejected "bills prohibit[ing] political contributions by *certain classes* of corporations," and instead adopted a broad prophylactic rule prohibiting contributions by "*any* corporation *whatever*." *United States* v. *Automobile Workers*, 352 U.S. 567, 573, 575 (1957) (emphases added); Gov't Br. 12-13. Although Congress has several times amended the campaign-finance laws, including recently in the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, not

once has it seen fit to tinker with that prophylactic rule.[4]

2. Respondents object (Br. 19 n.12) that there is "no factual evidence of corruption to the political system by NCRL or any other *MCFL*-type corporation." But just as in *NRWC*, the absence of "factual evidence of corruption" in the record of this case in no way casts doubt on the validity of Congress's time-honored "legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210; see *Nixon*, 528 U.S. at 391 n.5 (citing *NRWC*).[5]

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[4] Congress is presumed to mean what it said in applying its prohibition on contributions to "any corporation whatever," and to be aware of this Court's decisions such as *NRWC* recognizing that that prohibition applies to nonprofit advocacy corporations. In addition, Congress is certainly aware of Section 441b's application to nonprofit advocacy groups. For example, one of the corporations studied by Congress in enacting the Taft-Hartley Act in 1947 was American Action, Inc., which was a Delaware corporation that "claim[ed] to be motivated by patriotic purposes and to seek no personal gain" and, under the Federal Corrupt Practices Act, was "prohibited from making any contributions in connection with any election at which a Representative to Congress is to be chosen." *Report of Special Comm. to Investigate Campaign Expenditures*, H.R. Rep. No. 2739, 79th Cong., 2d Sess. 42-43 (1946). Likewise, during the floor debate on the 1947 amendments to the Federal Corrupt Practices Act, Senator Taft confirmed that the Act's prohibition on contributions applied to corporations that are not established for economic gain. 93 Cong. Rec. 6440 (1947). So too, in enacting the Federal Election Campaign Act of 1971, Congressman Hanson noted that the prohibition on contributions applied to nonprofit corporations such as the National Association of Manufacturers and the American Medical Association. 117 Cong. Rec. 43,380 (1971).

[5] Respondents' complaint as to the state of the record in this case is particularly unwarranted given that this Court's decisions already "accept" the validity of the prophylactic contribution rule

This Court has made clear that Congress's interest in protecting the integrity of federal elections extends beyond eradicating actual corruption to eliminating the appearance of corruption. Thus, in *Colorado Republican*, the Court emphasized that "political corruption" includes "not only *quid pro quo* agreements, but also * * * undue influence on an officeholder's judgment, and the *appearance* of such influence." 533 U.S. at 441 (emphasis added). See *Nixon*, 528 U.S. at 389 (Congress need not limit itself to the prevention of "*quid pro quo* arrangements," but instead also may respond to the "broader threat" created by "'improper influence' and 'opportunities for abuse.'"); *NRWC*, 459 U.S. at 210 ("The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized.").

Furthermore, as this Court recognized in *Buckley*, the coordination and consideration involved in making contributions directly to candidates is *inherently* likely to create political debts or at least the appearance of such debts. See 424 U.S. at 28 ("Congress was surely entitled to conclude that disclosure was only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption *inherent* in a system permitting unlimited financial contributions.") (emphasis added); see also *NCPAC*, 470 U.S. at 497.

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challenged in this case. *NRWC*, 459 U.S. at 210. The FEC should hardly be faulted for not producing record evidence in this case to establish the validity of a prophylactic rule that this Court "accept[ed]" more than 20 years ago. *Ibid.* Moreover, requiring the FEC to prove actual corruption in every case before enforcing Section 441b's prohibition on contributions would place an unbearable strain on the FEC's limited enforcement resources.

So too, both Congress and this Court have long recognized that corporations—and "the particular legal and economic attributes of corporations," *NRWC*, 459 U.S. at 209—present a substantial threat with respect to such corruption. See *Austin*, 494 U.S. at 659-660. Indeed, the prophylactic rule against corporate contributions was first enacted on the heels of a well-known episode of corporate money corrupting federal elections. See *Automobile Workers*, 352 U.S. at 572-576. Although the most notorious examples in that period involved large corporations, see *id.* at 571, this Court has accepted Congress's judgment to adopt a prophylactic rule that applies to *all* corporations, including "corporations * * * without great financial resources." *NRWC*, 459 U.S. at 210; see *NCPAC*, 470 U.S. at 500.

3. Respondents claim (Br. 19) that "*MCFL*-type corporations pose no potential of threat to the political system." That claim is implausible and, in any event, provides no basis for overturning the legislative judgment at issue in this case.

a. While not organized for economic gain, nonprofit advocacy corporations nonetheless have funds to contribute to political campaigns. Indeed, large nonprofits may be able to amass political war chests simply by relying on contributions from members. See Brent Coverdale, *A New Look at Campaign Finance Reform: Regulation of Nonprofit Organizations Through the Tax Code*, 46 U. Kan. L. Rev. 155, 172 (1997) ("Large contributions from wealthy sources have * * * helped the Christian Coalition raise $21 million for its influential campaign activity"). These sums have been assembled even without the additional incentives, which would be created by respondents' proposed rule, to funnel money to nonprofits to avoid contribution limits. See *infra*. Moreover, nonprofits may—and, as this case

illustrates, do—accept money from business corporations. See Gov't Br. 5. Thus, as this Court recognized in *Austin*, 494 U.S. at 664, it is possible for nonprofit groups to "serve as a conduit for corporate political spending."[6]

Equally important, as respondents acknowledge (Br. 29), even with respect to smaller nonprofit advocacy corporations, the influx of campaign contributions that would almost certainly follow if this Court were to create the exception sought by respondents could create the reality or appearance of corruption in the case of candidates receiving numerous contributions from various nonprofit corporations. In that regard, the concern and certainly perception that candidates may be influenced by political donations is just as real when contributions come from nonprofit environmental groups that support *increased* emissions standards as when the contributions come from for-profit automobile manufacturers that support a *reduction* in those standards. Although respondents state (Br. 29) that "this case does not * * * involve a concern of systematic political corruption by the aggregation of many contributions from *MCFL*-type corporations," that concern

[6] Indeed, lower courts have concluded that nonprofit advocacy corporations with significant financial resources from member as well as business funds may qualify for the *MCFL* exception with respect to independent expenditures, and thus qualify for the exemption urged by respondents in this case with respect to campaign contributions. See, *e.g.*, *FEC* v. *National Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001) (holding that National Rifle Association qualified for *MCFL* exception with respect to independent expenditures in an election year in which it received "$1000 in corporate contributions" and "substantial revenues from corporate advertising in its magazines").

supports Congress's decision to adopt a broad prophylactic rule prohibiting contributions by *any* corporation.

b. Respondents' proposed rule also would create incentives for circumventing existing campaign-finance laws. For example, respondents' rule would create incentives for nonprofit advocacy corporations to proliferate because of the ease by which nonprofit corporations could be used to circumvent existing contribution limits, thus creating an entire new class of potential contributors and thus political debts. Those incentives, in turn, would undermine the integrity of the limits on individual contributions and enhance the likelihood that multiple, related groups could funnel substantial aggregated amounts to candidates. For example, if a national organization with 50 separately incorporated state offices could channel $100,000 to a candidate, that amount surely could create an "undue influence on an officeholder's judgment" (*Colorado Republicans*, 533 U.S. at 441), or at least the appearance of such influence. Moreover, enforcement efforts to determine whether nonprofit corporations are being used by members or others as devices for excessive individual contributions would be made more difficult because the distinguishing characteristic of a corporation is its separateness from the individual. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001). That is true for nonprofit corporations, as much as for-profit corporations. Indeed, respondents concede that the principal benefit of the corporate form for nonprofits is that the corporation is a distinct entity for liability purposes. See Resp. Br. 17-18.

Furthermore, by creating incentives for contributions to be funneled through nonprofit corporations, respondents' proposed rule will limit the efficiency of the federal registration and disclosure requirements

with respect to political contributions. To the extent that contribution disclosure reports identify nonprofit corporations formed in part to circumvent contribution limits, they will not meaningfully identify the true donors of campaign contributions by such nonprofits. The stringent disclosure rules designed to address this problem in the context of PACs do not apply to nonprofit corporations, see note 8, *infra*, and although additional disclosure requirements could be imposed on all nonprofit corporations, such requirements could affect the associational rights that respondents themselves seek to invoke.

Recognizing an exception for nonprofit advocacy corporations from Section 441b's prohibition on corporate contributions would also encourage evasion of the carefully crafted limits on contributions to PACs and minimize the role of PACs. See *California Med. Ass'n*, 453 U.S. at 182. This Court recently recognized the value of eliminating such incentives in the campaign-finance context in particular, where experience shows that money invariably flows to—and through—any potential loopholes in the law. See *Colorado Republican*, 533 U.S. at 465 ("[A] party's coordinated expenditures, unlike expenditures truly independent, may be restricted to minimize circumvention of contribution limits."); see also *Austin*, 494 U.S. at 664 (recognizing that corporations may be used as a "conduit" for political spending).[7]

[7] Recent experience leaves little doubt that, at least as a general matter, nonprofit advocacy groups have grown increasingly sophisticated and effective in seeking to influence elections through both permissible and, on occasion, impermissible means. See generally Robert Paul Meier, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. Pa. L. Rev. 971 (1999) (discussing abuses documented in connection with 1996 election cycle and recommending that nonprofit corporations be required to conduct their activities through PACs); Coverdale, *supra*, at 157 (concluding that the Federal Election Campaign Act "is ineffective at controlling the campaign activity of social welfare nonprofit corporations"); see also Br. of Amicus Public Citizen, Inc. *et al.*, 17-18.

c. At the same time, Congress may account for the fact that all corporations, including nonprofits, enjoy "special benefits conferred by the corporate structure." *Austin*, 494 U.S. at 661; see *ibid.* ("Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process."). For example, as this Court has recognized, the corporate form confers important limitations on the potential liability of nonprofit corporations and their officers and directors, offers perpetual life for such groups, and results in certain favorable tax treatment. See *Austin*, 494 U.S. at 658-659. In particular, nonprofit corporations such as NCRL that qualify under Section 501(c)(4) of the Internal Revenue Code enjoy an exemption from federal income taxation, which itself amounts to a valuable subsidy. See *Regan* v. *Taxation Without Representation*, 461 U.S. 540, 544 (1983) ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.").

The Section 501(c)(4) tax exemption provides nonprofit groups with an infusion of "wealth that is taxpayer subsidized," and the exemption both produces "lower costs" and creates a desirable "'halo effect' of credibility for potential donors." Coverdale, *supra*, at 156; see *id.* at 161-162 (discussing benefits of tax-

exempt status). Moreover, as experience confirms, the tax exemption benefits nonprofit corporations seeking to influence elections or candidates. See *id.* at 181 ("The Internal Revenue Code allows [nonprofit] groups to accept unlimited contributions based upon the groups' tax-exempt status. These contributions become a political war chest as the groups use their resources to influence federal campaigns."); see also *id.* at 156 ("Groups seeking or granted this [tax exempt] status now include the Sierra Club, the National Rifle Association, Empower America, and the Christian Coalition, groups with notable political motivations.").

As this Court stated in *NCPAC*, "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." 470 U.S. at 495. Congress has permissibly determined that individuals who voluntarily choose to avail themselves of the benefits of the corporate form should be required to forgo the right to make political contributions directly through the corporation and instead—to safeguard the integrity of federal elections—be required to make contributions through a PAC or in their individual capacity.

C. Nonprofit Advocacy Corporations Such As NCRL Enjoy Ample Means To Engage In Political Advocacy

Respondents and their amici extol the role of advocacy groups in our political system and suggest that prohibiting such groups from making contributions to candidates for federal office threatens that role. See Resp. Br. 5-12; Br. for Amicus American Taxpayers Alliance 4-7, 17-18. But continuing to recognize the validity of Section 441b's prohibition on contributions by corporations poses no such threat.

The federal prohibition on direct political contributions "by any corporation whatever" has existed for nearly a century. See Gov't Br. 12-13 & n.5. Yet today the number and political influence of nonprofit advocacy groups has perhaps never been greater. See 3 *Senate Comm. on Governmental Affairs, Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns: Final Report*, S. Rep. No. 167, 105th Cong., 2d Sess. 3993 (1998) ("The 1996 election witnessed an unprecedented level of political activity by nonprofit groups."; "during the 1996 election cycle, nonprofit groups spent between 55 and 70 million dollars on political advocacy campaigns."); *Developments in the Law—Political Activity of Nonprofit Corporations*, 105 Harv. L. Rev. 1579, 1656 (1992) ("Nonprofit corporations play an increasingly prominent role in shaping American public opinion and in influencing public policy. Non-profit organizations such as the Sierra Club, the American Civil Liberties Union, and the National Rifle Association are perennial high-profile participants in political discourse.").

That is not surprising. As discussed (Gov't Br. 30-31), political advocacy groups such as respondent NCRL have numerous means, apart from making cash contributions to candidates, to propound their message. To begin with, as amici RealCampaignReform.Org, Inc. *et al.*, explain (Br. 22), "[n]onprofit advocacy corporations such as NCRL engage in a variety of press activities"—*e.g.*, "[t]hey publish news, editorials, and commentaries, to communicate to the public." The statutory prohibition at issue in this case has no impact whatever on the ability of advocacy groups to engage in such conventional First Amendment activities. See *Nixon*, 528 U.S. at 395 n.7 (contribution limits "leav[e] persons free to engage in independent political expres-

sion" and "to associate actively through volunteering their services") (quoting *Buckley*, 424 U.S. at 28).

More to the point, while prohibiting corporations from making contributions directly to candidates for federal office, federal law and this Court's decisions nonetheless permit nonprofit advocacy corporations such as NCRL to engage robustly in the electoral process. As the Court recognized in *NRWC*, Section 441b permits corporations to participate "in the federal electoral process by allowing them to establish and pay the administrative expenses of [a PAC]." 459 U.S. at 201. Although federal law (see 2 U.S.C. 433-434) requires PACs to register and make certain disclosures in order to protect the integrity of the electoral process, a PAC "may be completely controlled by the sponsoring corporation or union, whose officers may decide which political candidates' contributions to the fund will be spent to assist." 459 U.S. at 200 n.4. Respondent NCRL has itself established a PAC and made both expenditures and contributions in connection with federal elections through its PAC. See Gov't Br. 6.[8]

What is more, corporations that meet the requirements of the exception established by this Court in *MCFL* may engage in unlimited independent spending in connection with federal elections without even having to form a PAC, and thus enjoy a unique opportunity to participate in elections not shared by other

[8] One of the advantages of the PAC system is that registration and disclosure requirements allow Congress and the FEC to keep track of the individuals or separate segregated funds that contribute to PACs, and thus indirectly to federal campaigns. 2 U.S.C. 433-434. By contrast, there is no requirement that an *MCFL*-type corporation disclose all the sources of its funding, even in the case of large nonprofit corporations that may qualify for the *MCFL* exception in the case of election expenditures.

corporations. See Gov't Br. 30-31. After repeatedly criticizing the distinction between expenditures and contributions that underlies this Court's jurisprudence on campaign finance generally and in the corporate context in particular, see, *e.g.*, Resp. Br. 33-34, respondents belatedly acknowledge (*id.* at 42) that the two are not "fungible." To the extent that respondents note that independent expenditures allow groups to articulate a more nuanced message than the blunt "impl[ied] endorsement" (*ibid.*) communicated by a contribution, they are correct, and that is a principal reason for subjecting contribution limits to less demanding review under the First Amendment. To the extent that respondents suggest that contributions provide a unique form of endorsement in "symbolic identification" (*id.* at 43), there are more communicative ways to convey the same message. In particular, rather than relying on the endorsement *implied* by a contribution, nothing prevents an *MCFL* corporation from *expressly* endorsing its candidate of choice.[9]

In short, nonprofit advocacy corporations such as NCRL are prohibited by Section 441b only from directly making campaign contributions—the political activity that inherently presents the greatest threat of actual and apparent corruption and yet involves only a marginal expressive component. Congress has determined that the small burden imposed by the prohibition on such contributions is justified in light of the vital

[9] Of course, in addition to the foregoing forms of political activity, the individual members of nonprofit advocacy corporations remain free to make their own contributions to candidates in accordance with federal limits, and nonprofit corporations may encourage their members to make such contributions in connection with particular candidates or campaigns.

importance of protecting the integrity of federal elections. This Court has previously "accept[ed]" (*NRWC*, 459 U.S. at 210) that legislative judgment. There is no reason to reach a different conclusion here.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed insofar as the court of appeals held that Section 441b's prohibition on direct corporate contributions is unconstitutional as applied to respondent NCRL.

Respectfully submitted.

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IN THE

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FEDERAL ELECTION COMMISSION,
Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,
Respondents.

On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters granting consent of the parties to the filing of this brief have been filed with the Court.[1]

[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. ATLA is also a nonprofit corporation which has established and maintained ATLA-PAC, a separate segregated fund under 2 U.S.C. § 441b, to allow voluntary participation by ATLA members in federal election campaigns.

In ATLA's view, Congress in the Federal Election Campaign Act struck a careful balance. By requiring corporations that wish to make federal campaign contributions to do so only through a separate segregated fund protects First Amendment rights. At the same time, it safeguards the electoral process from the corrosive influence of direct corporate spending and donations to candidates for federal office.

ATLA's experience in operating its separate segregated fund has been that the administrative requirements imposed by the FEC serve important governmental interests and are not so onerous as to discourage protected political speech. ATLA is concerned that the decision below undermines Congress' efforts to protect our most fundamental democratic institution.

SUMMARY OF THE ARGUMENT

1. In an effort to protect federal elections from the corrosive influence of corporate campaign spending, Congress prohibited corporations from spending their own general funds in federal campaigns. At the same time, Congress protected the First Amendment rights of individuals affiliated with corporations by authorizing corporations to establish separate

segregated funds so that stockholders, certain employees and "members" of corporations can voluntarily contribute to election activities, subject to prescribed limits and disclosure requirements.

The court below erred in holding this portion of the Federal Election Campaign Act unconstitutional as applied to North Carolina Right to Life, Inc., a nonprofit corporation devoted to political advocacy. The underlying premise of this decision is that the administrative requirements for setting up and operating a PAC are so onerous as to discourage small nonprofit organizations like NCRL from doing so.

The lower court failed to establish the essential foundation for its as-applied ruling. Because the court held that the statute and regulations were facially constitutional, it was NCRL's burden to show that the administrative requirements were too costly for it to comply.

The lower court erred in comparing the administrative requirements facing NCRL with those of a hypothetical unincorporated association. Examination of these requirements shows that the burdens they impose are not significantly greater than the burdens that nonprofit corporations already bear because of state law or other reasons apart from § 441b.

Additionally, an affirmance by this Court of the decision below would likely result in a mere advisory opinion. NCRL would remain prohibited from making direct candidate contributions by its decision to qualify for tax exempt status as a 501(c)(4) organization.

2. Even if this Court should determine that the FEC's administrative requirements amount to a burden on First Amendment rights, that burden is justified by the government's compelling interest in protecting the electoral process from corruption and the appearance of corruption.

This Court's previous decision creating an exemption from § 441b on First Amendment grounds for certain nonprofit corporations wishing to make independent expenditures does not require the same result for those wishing to make candidate contributions. Restrictions on expenditures reduce political speech and thus infringe on First Amendment rights to a far greater degree than limits on contributions. Additionally, while NCRL's members enjoy a First Amendment right of association, the corporation itself has no separate right of its own to associate with political candidates.

At the same time, the government's interest in preventing corruption is far more compelling in the context of candidate contributions than for independent expenditures. Preventing *quid pro quo* corruption of federal officials justifies the restrictions imposed by FECA.

3. The lower court also erred in determining exemption from § 441b for nonprofit corporations to make campaign expenditures is available to a nonprofit that has accepted small amounts of funds from business corporations. This Court limited that exemption to nonprofits whose policy is not to accept such contributions. The lower court's expansion of the exemption opens the door to business corporations seeking to funnel funds into federal campaigns through nonprofits, precisely the harm Congress sought to prevent.

ARGUMENT

I. FEDERAL ELECTION CAMPAIGN ACT REQUIREMENTS FOR ESTABLISHING AND OPERATING A SEPARATE SEGREGATED FUND BY A CORPORATION DO NOT IMPOSE A SUBSTANTIAL BURDEN ON FIRST AMENDMENT RIGHTS.

The Federal Election Campaign Act of 1971, provides, in part:

> It is unlawful . . . for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any [federal] election.

2 U.S.C. § 441b(a).

For nearly a century, Congress has been concerned with protecting the democratic process from the influence of corporate money on federal elections. *See FEC v. National Right to Work Committee*, 459 U.S. 197, 208-09 (1982) [hereinafter "*NRWC*"]; *United States v. Automobile Workers*, 352 U.S. 567, 570-84 (1957).

Although § 441b(a) bans corporate officers from simply drawing on the corporation's general funds to support the candidate of their choice, Congress did "not stifle corporate speech entirely." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990). Rather, Congress enabled individuals affiliated a corporation to participate in voluntary political activity under the sponsorship of the corporation. FECA authorizes a corporation to make expenditures for "the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political

purposes by a corporation," including a "corporation without capital stock." 2 U.S.C. § 441b(b)(2)(C). Such a fund is commonly referred to as a political action committee, or PAC. The corporation may solicit PAC funds from stockholders, certain employees, or the "members" of a corporation without capital stock. 2 U.S.C. § 441b(b)(4)(C). The PAC in turn may make both direct contributions and independent expenditures in connection with federal elections. 2 U.S.C. § 441b(b).

This Court has recognized that, while financial support for candidates implicate First Amendment values, "a separate segregated fund that makes contributions to candidates . . . under our decision in *National Right to Work Committee*, must be established by all corporations wishing to make such candidate contributions." *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 264 n.13 (1986)[MCFL].

A. The Decision Below Was Not Based On Any Finding That Compliance With §441b Would Be Unduly Burdensome To NCRL.

The court below disagreed that "all corporations" must comply with the congressional scheme. The court ruled that, as applied to Respondent North Carolina Right to Life, Inc. ["NCRL"], the statute and two regulations promulgated thereunder, 11 C.F.R. 114.2 and 114.10, violated the First Amendment. Specifically, the court stated, "many small groups may be unable to bear the substantial costs of complying with these regulations." Pet. at 15a. The court concluded that the requirements imposed a substantial burden on the exercise of First Amendment rights. Pet. at 17a.

Because the court of appeals, like the district court, held that § 441b and its regulations were constitutional on their face, Pet. at 30a, NCRL bore the burden of demonstrating that, alternatively, the provisions were unconstitutional as applied to it. NCRL, however, failed to show how great a burden the administrative requirements imposed upon it and whether it is "unable to bear the substantial costs" of compliance.

In fact, NCRL has set up its own PAC. *See North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 709 (4th Cir.1999), *cert. denied,* 528 U.S. 1153 (2000); *see also* Pet at 55a n.2. It could easily have demonstrated with some precision its actual administrative costs to establish and operate the fund. It did not. Consequently, the court below lacked the foundation for its "as applied" ruling.[2]

B. Compliance With Regulations Governing Separate Segregated Funds Is Not So Onerous As To Discourage the Exercise of First Amendment Rights.

Instead, the lower court was content with presenting a list of the administrative requirements for setting up and operating a separate segregated fund under § 441b(a). Pet. at 14a-15a. The court characterized these staffing, recordkeeping and

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2 The court borrowed heavily from this Court's discussion in Federal Election Commission v. Massachusetts Citizens for Life, 479 U.S. 238 (1986). As the district court noted, NCLR's Complaint stated that it engaged in "minor business activities" and accepted some funds from business corporations. Pet. at 51a. NCRL thus differed from MCFL in two of the three features this Court pronounced "essential" to its holding in that case. 479 U.S. at 263.

disclosure requirements as "additional burdens" that "stretch far beyond the more straight-forward disclosure requirements on unincorporated associations." Pet. at 13a-14a. The court had "little difficulty" in concluding that the "practical effect" of these requirements was to "burden the exercise of political speech and association." Pet. at 16a-17a.

The court applied the wrong test. The court properly inquired whether the administrative requirements, when applied to NCRL, are so onerous as "to discourage protected speech [ ] sufficient to characterize § 441b as an infringement on First Amendment activities." *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986) [hereinafter *"MCFL"*]; see Pet. at 15a-16a. However, the answer does not lie in comparing burdens imposed on NCRL with those required of some hypothetical unincorporated association. The FEC did not command NGRL to adopt the corporate form.

The proper focus in this "as applied" challenge should be on whether § 441b imposes burdens on NCRL that are substantially greater than those it would bear if – as it desires – it were exempted from § 441b requirements.

ATLA itself is organized as a nonprofit corporation and operates a separate segregated fund under § 441b. Consequently, ATLA is well aware of the administrative costs associated with setting up and operating a PAC. It has been ATLA's experience that the burdens imposed by § 441b are not substantially greater than the burdens that a nonprofit corporation engaged in the same activities would bear in the absence of § 441b.

The court below listed ten FEC administrative requirements that it deemed so burdensome as to discourage political speech. Pet. at 14a-15a. Examination of these requirements indicates that they are less burdensome, and in some cases are duplicative of, requirements that nonprofit corporations must comply with, quite apart from § 441b.

Four of the quoted FEC requirements deal with setting up a separate segregated fund.[3]

1. Filing a statement of organization containing (1) its name and address; (2) the name of its custodian of records; and (3) its banks, safety deposit boxes, or other depositories, §§ 433(a) and (b).

Every state requires a corporation organized under state law to file articles of incorporation that include this and other information, except for item (3). *See, e.g.*, Del. Gen. Corp. Law, 8 Del. C. § 102 (2001); ALI-ABA, Model Nonprofit Corporation Act, § 2.02 (1987). It is difficult to imagine that a small nonprofit, even one with several bank accounts or deposit boxes, would require more than an hour to prepare this statement.

Most nonprofit corporations seeking tax exempt status must file a detailed informational return with the Internal Revenue Service. *See* IRS, Form 990: "Return of Organization Exempt From Income Tax" (2001). The FEC's requirement is modest by comparison.[4]

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3 For clarity, ATLA addresses the ten requirements in slightly different order than the lower court did.

4 The IRS estimates that even the short-form 990EZ, designed for organizations with less than $100,000 in revenues,

2. Reporting any change in the above information within 10 days, § 433(c).

Again, the FEC requirement is less burdensome than state-law requirements already imposed upon corporations. Nearly all states require periodic filing of information concerning a corporation and its personnel, regardless of whether that information has changed. *See* West's McKinney's Forms, Business Corporation Law § 3:12A (2002); *see, e.g.*, D.C. Code § 29-301.83 (2001) (requiring informational report to be filed by nonprofit corporations every two years); ALI-ABA, Model Nonprofit Corporation Act, § 16.22 (1987) (requiring annual informational reports).

3. Appointing a treasurer, § 432(a).

Regardless of whether state law requires the naming of a treasurer, *cf.*, ALI-ABA Model Nonprofit Corporation Act, § 8.40 (1987) ("Unless otherwise provided in the articles or bylaws, a corporation shall have a president, a secretary, a treasurer . . ."), any corporation involved in raising money and disbursing funds designates a responsible individual to handle those funds. The FEC requirement imposes no additional burden.

4. Terminating only upon filing a written statement that it will no longer receive any contributions or make any disbursements, and that it has no outstanding debts or obligations, § 433(d)(1).

State laws already obligate a corporation upon termination to file a certificate of dissolution or

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the average time required to prepare the form is over 14 hours and the time required for recordkeeping is over 28 hours. IRS, "Instructions for Form 990 and 990EZ" 43 (2001).

similar document with the appropriate state official. *See, e.g.*, Del. Gen. Corp. Law, 8 Del. C. § 278 (2001); ALI-ABA, Model Nonprofit Corporation Act 14.03 (1987).

Three additional requirements listed by the lower court involve receipts and disbursements.

5. Forwarding contributions to the treasurer within 10 or 30 days of receiving them, depending on the amount, § 432(b)(2).

6. Ensuring that the treasurer keeps an account of (1) every contribution regardless of amount; (2) the name and address of anyone who makes a contribution in excess of $50; (3) all contributions received from political committees; and (4) the name and address of every person to whom a disbursement is made regardless of amount, § 432(c).

7. Preserving receipts for all disbursements over $200 and all records for three years, §§ 432(c) and (d).

Even apart from its general obligations under state law, *see* ALI-ABA, Model Nonprofit Corporation Act, § 16.01 (1987) ("A corporation shall maintain appropriate accounting records"), every responsible organization that receives and disburses funds – including those engaged in social welfare and political activity – follows internal procedures for handling funds and preserving records that are at least as rigorous as those required by the FEC. Moreover, , a detailed list of current donors and their donations is likely to be one of the most valuable assets of a nonprofit corporation, which can be expected to maintain it diligently.

Two requirements cited by the court below relate to disclosure:

8. Filing either (1) monthly reports with the FEC; or (2) quarterly reports during election years, a pre-election report no later than the 12th day before an election, a post-election report within 30 days after an election, and reports every 6 months during nonelection years, § § 434(a)(4)(A) and (B).

9. Including in such reports information regarding (1) the amount of cash on hand; (2) the total amount of receipts in multiple categories; (3) the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, interest, or any other offset to operating expenditures in an aggregate amount above $200; (4) the total amount of all disbursements in numerous categories; (5) the names of all authorized or affiliated committees to which transfers have been made; (6) persons to whom loan repayments or refunds have been made; and (7) the total sum of all contributions, operating expenses, outstanding debts and obligations, and the settlement terms of the retirement of any debt or obligation, § 434(b).

Even unincorporated organizations and those exempted from § 441b as qualified nonprofit corporations must comply with certain FEC reporting requirements, including the names of contributors of more than $200 and the names and addresses of recipients of more than $200. See 2 U.S.C. § 434(c). The FEC requirements for PAC disclosures are more exacting, but not unreasonably so.

Significantly, only four Justices in *MCFL* viewed the disclosure requirements of § 441b as a burden on First Amendment rights as applied.

Justice O'Connor parted company with the plurality on precisely this point, stating that "the burden of disclosing independent expenditures generally is 'a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.'" 479 U.S. at 265-66 (O'Connor, J., concurring in part), quoting *Buckley v. Valeo*, 424 U.S. 1, 82 (1976) Hence, the § 441b disclosure requirements cannot be viewed as an infringement of First Amendment rights.

10. That a group's segregated fund solicit contributions only from its "members," §§ 441b(b)(4)(A) and (C).

This requirement does not represent an administrative cost at all. It is a limitation on the permissible scope of solicitations for donations to the PAC.[5] Most importantly, this Court squarely held in *Federal Election Commission v. National Right to Work Committee*, 459 U.S. 197 (1982), that this restriction does not infringe upon First Amendment rights and is narrowly tailored to serve the compelling governmental interest "in preventing both actual corruption and the appearance of corruption of elected representatives." *Id.* at 208 & 210.

In sum, the "practical effect" of the administrative requirements associated with establishing and maintaining a separate segregated fund does not impose undue burdens beyond those

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5 Indeed, the practical effect of this limit on solicitation would be to minimize the fundraising costs to the PAC's corporate sponsor.

that nonprofit corporations routinely bear as a consequence of their choice to adopt the corporate form. To the extent that some requirements demand additional effort on the part of corporate sponsors of separate segregated funds, this Court has upheld the requirements as justified by compelling government interests.

C. Affirmance Would Result In a Mere Advisory Opinion Because NCRL Has Chosen a Tax Status That Precludes Contributions To Candidates.

NCRL is a nonprofit corporation exempted from federal income tax under I.R.C. § 501(c)(4). Pet. at 2a. As such, it has accepted certain restrictions on its political activity in exchange for tax exemption.

To qualify under § 501(c)(4), a nonprofit organization must be "operated exclusively for the promotion of social welfare." *Id.* Independent expenditures for advocacy and "[d]iscussion of public issues and debate on the qualifications of candidates," may be viewed as promoting social welfare. *Buckley v. Valeo, supra,* 424 U.S. at 14.[6]

However, making campaign contributions to particular candidates is not a permissible activity for such an organization. Treasury Regulations make clear that "promotion of social welfare does not

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6 The IRS has stated that the section did not impose "a complete ban" on "political campaign activities." Rev. Rul. 81-95 (1981). The Service thus appears to view some election-related advocacy as consistent with promoting social welfare. *See Developments in the Law -- Nonprofit Corporations*, 105 Harv. L. Rev. 1656, 1665 (1992).

include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." Treas. Reg. §1.501(c)(4)-1(a)(2)(ii) (as amended in 1990).

This restriction itself is consistent with the First Amendment. As this Court has explained, a tax exemption is a form of subsidy that "has much the same effect as a cash grant to the organization." *Regan v. Taxation With Representation Of Washington*, 461 U.S. 540, 544 (1983). As the Court stated in connection with a ban on lobbying in that case, Congress does not infringe upon First Amendment rights simply by refusing to subsidize their exercise. *Id.* at 546.

Even if the Court affirmed that NCRL is exempted from § 441b requirements, NCRL would remain subject to the ban on campaign contributions which it accepted in exchange for tax exemption.[7] Consequently, ATLA suggests, this Court's decision would amount to little more than an advisory opinion.

II. THE PROHIBITION AGAINST DIRECT CORPORATE CONTRIBUTIONS TO FEDERAL CANDIDATES IS FAR LESS AN INFRINGEMENT ON FIRST AMENDMENT

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7 Nothing in this section shall be construed to authorize any organization exempt from taxation under 26 U.S.C. 501(a), including any qualified nonprofit corporation, to carry out any activity that it is prohibited from undertaking by the Internal Revenue Code, 26 U.S.C. 501, et seq.

11 C.F.R. § 114.10(i).

RIGHTS THAN A PROHIBITION AGAINST INDEPENDENT EXPENDITURES AND SERVES A MORE COMPELLING GOVERNMENTAL INTEREST.

Even if this Court determines that 2 U.S.C. §441b imposes a substantial burden on First Amendment rights, that burden is outweighed by the compelling governmental interest at stake.

The court below relied heavily on *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ["MCFL"], which held that the administrative burden under § 441b of establishing a PAC was not justified by a compelling governmental interest, as applied to certain nonprofits wishing to make independent campaign *expenditures*.

The lower court in this case concluded that the *MCFL* rationale "is equally applicable in the context of direct contributions." Pet. at 25a. The court asserted that "the distinction between contributions and expenditures [is] immaterial in this case." *Id.* at 29a. ATLA submits that this distinction is constitutionally crucial, and the lower court's failure to recognize it fatally undermines its decision.

A. Requiring Corporations to Make Contributions Through a PAC Imposes Less of a Burden on Speech Than Requiring Corporations to Use a PAC for Independent Expenditures.

This Court has consistently recognized that "[FECA's] *expenditure* ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its

limitations on financial *contributions*." *Buckley v. Valeo*, 424 U.S. at 23. (emphasis added)

At the outset, the *MCFL* Court made clear that it did not view "the effect of additional reporting and disclosure obligations" as an additional burden on the speech of an organization's contributors. Rather, its concern was whether "the administrative costs of complying with such increased responsibilities may create a disincentive for the organization itself to speak." 479 U.S. at 255 n.7.

Protection of a corporation's speech differs from that accorded to individuals. This Court has carefully delineated between First Amendment protection of a natural person's right of self-expression and the protection of the "inherent worth of the speech in terms of its capacity for informing the public" regardless of whether its source is a corporation, a union or an individual. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 777 (1978). "In the case of corporate political activities, we are not at all concerned with the self-expression of the communicator." *Id.* at 806 n.6. Rather, it is the second protection, "often referred to as the right to hear or receive information," which is at stake. *Id.* at 806.

Independent expenditures that seek to inform or persuade voters clearly increase the amount of "speech concerning public affairs [that] is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964). They are deserving of First Amendment protection commensurate with the inherent worth of such speech. "Independent expenditures," the *MCFL* Court stated, "constitute expression 'at the core of our electoral process and of the First Amendment freedoms.'" at 251, citing

Buckley, 424 U.S., at 39; and *Williams v. Rhodes,* 393 U.S. 23, 32 (1968). *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985) (independent expenditures "produce speech at the core of the First Amendment").

The same is not true with respect to candidate contributions. Such contributions add little to public discussion of political issues. Setting aside the protection of self-expression accorded only to natural persons, restriction of contributions "does not in any way infringe the contributor's freedom to discuss candidates and issues." *Buckley v. Valeo,* 424 U.S. at 21. Consequently, § 441b does not infringe upon protected speech by nonprofit corporations.

The lower court also held that § 441 infringed on NCRL's First Amendment right of political association. Pet. at 11a & 17a. The First Amendment clearly protects the right of individuals to associate together, *NAACP v. Alabama,* 357 U.S. 449, 460 (1958), and to associate themselves with a political candidate through the symbolic act of contributing to campaigns, *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976). This individual right is unaffected by § 441b. This Court has never held that corporations – including nonprofits – have a separate and independent First Amendment right to associate themselves with political candidates.

In view of their lesser infringement of First Amendment rights, this Court has "consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending." *MCFL* at 259-60.

B. FECA Serves a Compelling Interest In Preventing Corruption and the Appearance Of Corruption In Federal Elections.

At the same time, the dangers Congress sought to prevent by enacting § 441b are greater than those associated with independent expenditures, so that, this Court has stated, "the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures." *MCFL* at 479 U.S. 261-262.

Section 441b, and its predecessor, the Federal Corrupt Practices Act, were enacted to rid the political process of the corruption and appearance of corruption that accompany contributions to and expenditures for candidates from corporate funds. *See NRWC, supra*, 459 U.S., at 207-208; *First National Bank of Boston v. Bellotti*, 435 U.S. at 788.

Congress' "overriding concern" was "the problem of corruption of elected representatives through the creation of political debts." *Bellotti, supra,* at 788 n.26; *NRWC, supra,* at 208. Recent abuses prompted Congress to address the problem that "contributions are given to secure a political *quid pro quo* from current and potential office holders, [undermining] the integrity of our system of representative democracy." *Buckley v. Valeo*, 424 U.S. at 26-27.

Independent expenditures, on the other hand, do not present as serious a threat to the integrity of the electoral system. As the *Buckley* Court explained:

> Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an

> expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, § 608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse.

424 U.S. at 47.

This Court's decision in *MCFL* does not support the lower court's decision. Even if NCRL is deemed equivalent to the nonprofit corporation in that case and the requirements imposed by § 441b are deemed a burden on First Amendment rights, NCRL is not entitled to exemption from those requirements for purposes of making direct candidate contributions. Compared to the restrictions on independent expenditures involved in *MCFL,* restrictions on contributions burden First Amendment rights to a lesser degree and are justified by a more compelling governmental interest.

Even as it established an exception to § 441b for certain nonprofits wishing to make independent expenditures, the *MCFL* Court made clear that "a separate segregated fund that makes contributions to candidates . . . must be established by all corporations wishing to make such candidate contributions." 479 U.S. at 264 n.13.

This Court should not retreat from that principled position.

III. FEDERAL ELECTION COMMISSION REGULATIONS PRECLUDING INDEPENDENT EXPENDITURES BY NONPROFIT CORPORATIONS THAT RECEIVE MONEY FROM FOR-PROFIT CORPORATIONS DO NOT VIOLATE FIRST AMENDMENT RIGHTS.

The court below also held that NCRL could not be prohibited under § 441b from using general funds for independent campaign expenditures, despite the fact that it received some funds from business corporations. Pet. at 21a. The lower court enlarged an exception to § 441b that this Court has narrowly circumscribed:

> MCFL has three features *essential* to our holding that it may not constitutionally be bound by § 441b's restriction on independent spending. First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. . . . Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . Third, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace."

MCFL, 479 U.S. at 263-64. (emphasis added).

The lower court redefined this Court's "essential" requirement that the nonprofit seeking exemption from § 441b adopt a "policy not to accept contributions" from business corporations to include accepting a "small amount of corporate contributions." Pet. at 6a n.2, citing the court's prior decision in *North Carolina Right to Life, Inc. v.*

Bartlett, 168 F.3d 705 (4th Cir. 1999). This redefinition completely undermines Congress' intent to restrict "the influence of political war chests funneled through the corporate form." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 501 (1985) [NCPAC].

Acting "to prevent both actual and apparent corruption," § 441b "reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. NRWC at 209-10. Corporations "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process." *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 661 (1990).

As this Court has recognized, Congress felt the potential for undesirable influence warranted the application of restrictions on candidate contributions to "corporations and labor unions without great resources, as well as those more fortunately situated," and to "membership corporations, though contributions by the latter . . . might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." NCPAC, 470 U.S. at 500. This Court has declined to "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *NRWC*, 459 U.S. at 210."

The *MCFL* Court's narrow exception for a nonprofit that has a "policy" not to accept funds from business corporations reflects deference to congressional intent. Congress was properly concerned that profit-making corporations should not be able to funnel their general funds into federal

elections. However, the Court concluded that the governmental interest in enforcing prophylactic safeguards against an influx of corporate money is not compelling where the policy of the nonprofits "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *MCRL*, 479 U.S. at 264.

The court below instead focused on the size of the funnel.

The court viewed NCRL's receipt of up to eight percent of its revenues from business corporations as comparatively "modest." Pet. at 21a. NCRL was therefore entitled to an exemption from § 441b requirements applicable to nonprofits that did not obtain "the overwhelming share of their donations from private individuals." Pet. at 22a. Such distinctions among corporations, however, are "distinctions in degree" rather than "differences in kind," and are more properly drawn by the legislature than by the judiciary. *Buckley v. Valeo*, 424 U.S. at 30.

Moreover, the court below opens a conduit for corporate spending that completely undermines the congressional objective. Congress was not concerned with preventing the influence of money from business corporations on nonprofits corporations. It was concerned with the influence of such money on federal elections. A stream of corporate funds that may be deemed a "modest" eight percent of the revenues of a nonprofit organization may yet exert a significant impact on a particular election campaign. It requires no great speculative power to foresee that business corporations wishing to funnel political war chests into campaigns could do so by contributing

"eight percenters" to a multiplicity of willing nonprofit organizations, all of which claim exemption from the disclosure requirements of § 441b under the lower court's analysis.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF PUBLIC CITIZEN, INC., COMMON CAUSE, DEMOCRACY 21, THE CAMPAIGN AND MEDIA LEGAL CENTER, and THE CENTER FOR RESPONSIVE POLITICS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does 2 U.S.C. 441b, which prohibits corporations and labor unions from making direct campaign contributions in connection with federal elections, violate the First Amendment as applied to an ideological non-profit corporation?

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Campaign Notebook: More Help Than Morella Wants,
Wash. Post, Oct. 3, 2002, at B4 18

Thomas B. Edsall, *Campaign Money Finds New Conduits as Law Takes Effect; Shadow Organizations to Raise "Soft Money,"*
Wash. Post, Nov. 5, 2002, at A2.....18

Thomas B. Edsall, *New Ways to Harness Soft Money in Works; Political Groups Poised to Take Huge Donations*, Wash. Post, Aug. 25, 2002, at A1 18

Thomas B. Edsall & Juliet Eilperin, *PAC Attack II: Why Some Groups Are Learning to Love Campaign Finance Reform*, Wash. Post,
Aug. 18, 2002, at B2 18

Juliet Eilperin, *After McCain-Feingold, A Bigger Role for PACs; Groups May Be "Soft Money" Conduits*, Wash. Post, June 1, 2002, at A1 18

INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with more than 135,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating the corruption of our political processes that results when the influence of corporate money is brought to bear on the electoral system. Public Citizen has long supported campaign finance reform, through both advocacy of campaign finance legislation before Congress and involvement in litigation raising campaign finance issues and related First Amendment issues arising out of the electoral process. For example, Public Citizen filed amicus curiae briefs in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), and joined in an amicus curiae brief in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"). In addition, Public Citizen has studied and reported extensively on the increasing involvement of non-profit organizations in electioneering activities, as politicians and their financial backers have sought to evade the contribution limits and reporting and disclosure requirements applicable to more traditional political organizations. Thus, Public Citizen has an intense and longstanding interest in the issues presented by this case.

Common Cause is a non-profit citizen action organization with approximately 200,000 members and supporters across the United States. Common Cause promotes, on a nonpartisan basis, its members' interest in open, honest, and ac-

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[1] Letters of consent to the filing of this brief from both parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

countable government and political representation, and it seeks to achieve this objective by making government more responsive to citizens through government and electoral reform, including reforms of the Nation's campaign finance laws. Common Cause has participated as a party or amicus curiae in many Supreme Court and lower court cases concerning the constitutionality and implementation of federal and state election laws, including most of this Court's campaign finance decisions from *Buckley v. Valeo*, 424 U.S. 1 (1976), to the present.

Democracy 21 is a non-profit, non-partisan public policy organization that works to eliminate the undue influence of big money in American politics and to ensure the fairness and integrity of our democracy. Democracy 21 supports campaign finance and other political reforms. It conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented.

The Center for Responsive Politics (CRP) is a non-partisan, non-profit research group based in Washington, D.C. Founded by former Senators Frank Church (D-Idaho) and Hugh Scott (R-Pa.), it has been tracking money in politics, and its effect on elections and public policy, since 1983. CRP conducts computer-based research on campaign finance issues for the news media, academics, activists, and the public at large. CRP publishes the results of its research on its website, www.OpenSecrets.org, as well as in numerous publications made available to the public. CRP's work is aimed at creating a more educated voter, an involved citizenry, and a more responsive government. Among CRP's projects is FEC Watch, which is dedicated to ensuring enforcement of the nation's campaign finance laws in furtherance of CRP's research and analysis.

The Campaign and Media Legal Center is a non-profit organization created to act as the "people's voice" in administrative hearings and judicial proceedings involving campaign finance and media laws. The Legal Center is managed through the auspices of the University of Utah's Campaign and Media Studies Program, which was created to support and develop areas of inquiry and action on these issues through academic research, conferences, and internship programs. The heart of the Legal Center's mission is to advance a non-partisan agenda by representing the public perspective in administrative and legal proceedings interpreting and enforcing the campaign and media laws. The Legal Center seeks to play an active role in generating legal and policy debate about disclosure, soft money, issue advocacy, and contribution limits by participating in FEC rulemaking and enforcement proceedings as well as cases addressing campaign finance issues in federal and state courts.

As non-profit groups themselves, the amici curiae who join in this brief are also keenly aware of—and sensitive to—the First Amendment interests of the types of organizations that this case concerns. Nonetheless, amici curiae do not believe that the ability to make corporate contributions to candidates for electoral office is essential to the exercise of the First Amendment rights of such organizations or their members. And amici curiae are deeply concerned that opening the door to campaign contributions by non-profit corporations—especially those that do not disavow acceptance of corporate cash—will lead to circumvention of limits on campaign contributions that have long been sustained by this Court and will threaten to bring about the corruption of the electoral process that those limits are designed to prevent. Amici curiae therefore submit this brief urging reversal of the Fourth Circuit's decision in this case.

SUMMARY OF ARGUMENT

In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), this Court held that the Federal Elec-

tion Campaign Act ("FECA") could not constitutionally be applied to prohibit certain non-profit corporations from expending funds to engage in their own political speech advocating the election of candidates for federal office. The question posed by this case is whether, for the first time, the protection afforded independent political *expenditures* by *MCFL* is to be extended to permit corporations to make *contributions* directly to candidates for political office.

This Court's campaign finance jurisprudence has, from its beginnings, extended significantly less protection to campaign contributions than to expenditures by individuals or organizations needed to support their own speech. *See Buckley v. Valeo*, 424 U.S. at 20-21; *Nixon v. Shrink Missouri PAC*, 528 U.S. at 385-89; *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 446, 456, 464 (2001) ("*Colorado II*"). Campaign contributions by corporations (even non-profit corporations) and labor unions have long been banned outright, and this Court has recognized that the ban serves the compelling purpose of preventing corruption. *FEC v. National Right to Work Committee*, 459 U.S. 197, 208-10 (1982) ("*NRWC*").

Indeed, in *NRWC*, the Court unanimously held that even a non-profit, ideological membership corporation could be prevented from soliciting funds to be used for campaign contributions unless it complied with the requirements for establishing a separate segregated fund under FECA. When the Court later held in *MCFL* that such organizations could not be prevented from engaging in independent *expenditures*, it expressly distinguished the *contribution* restrictions upheld in *NRWC*. Thus, in holding that *MCFL* requires that non-profit ideological corporations be permitted to make campaign contributions, the Fourth Circuit in this case had to disregard what this Court said not only in *NRWC*, but also in *MCFL* itself.

There is no reason for this Court to reconsider these settled principles. The prohibition on direct corporate contributions to candidates burdens the First Amendment rights of non-profit organizations and their members only minimally, if at all. It leaves the organizations free to engage directly in protected speech to the full extent permitted by *MCFL*, and it permits their members to contribute directly to whatever candidates they choose (subject to the limits sustained in *Buckley*) or to contribute through a separate segregated fund or "PAC" established by the non-profit corporation under the provisions sustained in *NRWC*. In contrast to its modest impact on First Amendment values, the prohibition on corporate contributions advances the important interest in preventing non-profit organizations from being used as conduits to circumvent the contribution limits upheld in *Buckley*, undermining their goal of standing as a bulwark against corruption. Permitting *MCFL* corporations to make candidate contributions would effectively allow them to take on many of the functions of a PAC entirely free from the contribution limits and other restrictions that FECA imposes on PACs—and that this Court has sustained in previous cases.

For these reasons, the Court should follow its precedents that require reversal of the Fourth Circuit's decision on the discrete issue presented by this case. The Court has not been invited by the parties to reexamine the validity of those precedents in this case, and there is no occasion for doing so. To be sure, broader and more fundamental questions of campaign finance law will soon come before this Court with the inevitable appeals from the three-judge district court that is currently hearing challenges to the Bipartisan Campaign Reform Act of 2002. The narrow issue posed by this case, however, can be decided without prejudging or pretermitting consideration of the many issues the Court will be called upon to resolve concerning the new legislation. The Court need only rely on settled principles to sustain the constitutionality of applying the longstanding prohibition on corporate campaign contributions to the non-profit corporation involved in this case.

ARGUMENT

I. THIS COURT'S PRECEDENTS PRECLUDE EXTENDING *MCFL* TO CORPORATE CONTRIBUTIONS.

In *Buckley v. Valeo*, this Court held that limits on campaign contributions "entai[l] only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20. In the years since then, the Court has regularly relied on this aspect of *Buckley* to sustain limits on campaign contributions (and their functional equivalent, coordinated campaign expenditures), even when limits on independent expenditures have been struck down. *See, e.g.*, *Colorado II*, 533 U.S. at 440-43; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 385-89; *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985) ("*NCPAC*"); *California Medical Association v. FEC*, 453 U.S. 182, 196-98 (1981) (plurality opinion). In *Shrink Missouri*, the Court expressly held that, under *Buckley*, laws restricting campaign contributions are subject to a standard of First Amendment review significantly less stringent than the strict scrutiny applicable to direct restraints on speech and association. 528 U.S. at 386-89.

Buckley itself neither directly addressed nor called into question the longstanding federal statutory provisions (now incorporated into FECA and found in 2 U.S.C. § 441b) that prohibit corporations and labor unions from using funds in their general treasuries to make contributions to candidates for federal office. In *NRWC*, however, the Court directly considered—and upheld—the application of those provisions to a non-profit corporation organized to pursue ideological purposes.

The non-profit corporation in *NRWC* had established a "separate segregated fund" for the purpose of making contributions to candidates that the corporation itself was prohibited from making under 2 U.S.C. § 441b. Under FECA, the organization could not contribute its own funds to the separate segregated fund, and could only solicit contributions to the fund from "members." The issue in *NRWC* was whether it violated the First Amendment rights of a non-profit corporation (and its members) to prevent the organization from soliciting funds from non-members to use for making campaign contributions.

In a unanimous decision by then-Justice Rehnquist (indeed, the only decision in the Court's campaign finance jurisprudence from *Buckley* on that generated no separate opinions), the Court sustained the limitation against the First Amendment challenge, holding that the rights asserted by the challengers were "overborne by the interests Congress has sought to protect in enacting § 441b." 459 U.S. at 207. The Court identified two such interests: the need "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political 'war chests' which could be used to incur political debts from legislators who are aided by the contributions," *id.*; and the need "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *Id.* at 208.

The Court held that these purposes were "sufficient to justify" § 441b, *id.*, even as applied to an ideologically driven non-profit organization "without great financial resources." *Id.* at 210. The Court explicitly "accept[ed] Congress's judgment that it is the potential for [corporate] influence that demands regulation," and refused to "second guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* Thus, the Court held, "there is no reason" that the interest in preventing corruption "may not in this case be accomplished by treating unions, corporations, and similar organizations differently from individuals." *Id.* at 210-11.

Although the precise issue before the Court in *NRWC* was the constitutionality of the provision forbidding solicitation of contributions to the separate segregated fund from non-members of the organization, the Court's decision necessarily also sustained the basic prohibition on the use of the non-profit corporation's own funds for contributions. Indeed, if (as the Fourth Circuit held in this case) the corporation had a constitutional entitlement to make candidate contributions using its own general funds—solicited from members and non-members alike—it would be pointless to have held that it could be limited to soliciting members for the separate segregated fund. Thus, the Court's constitutional analysis in *NRWC* logically presupposed the constitutionality of the basic prohibition on the use of corporate funds for contributions to candidates.

The Court recognized this very point two Terms later in *NCPAC*. There, even while holding that a political action committee—a PAC—had a First Amendment right to engage in *expenditures* for its own political speech that exceeded limits Congress sought to impose by statute, the Court distinguished its treatment of corporate *contributions* in *NRWC*:

> [*NRWC*] turned on the special treatment historically accorded corporations. In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals. ... We held in *NRWC* that a rather intricate provision of the FECA dealing with the prohibition of corporate campaign contributions to political candidates did not violate the First Amendment. The prohibition excepted corporate solicitation of contributions to a segregated fund established for the purpose of contributing to candidates, but in turn limited such solicitations to stockholders or members of a corporation without capital stock. We upheld this limitation on solicitation of contributions as applied to the National Right to Work Committee, a corporation without capital stock, *in view of the well-established constitutional validity of legislative regulation of corporate contributions to candidates for public office. NRWC* is consistent with this Court's earlier holding that a corporation's expenditures to propagate its views on issues of general public interest are of a different constitutional stature than corporate contributions to candidates.

NCPAC, 470 U.S. at 495-96 (citing *NRWC* and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789-90 (1978)) (emphasis added).

NCPAC went on to reaffirm *Buckley*'s holding that there is "a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *Id.* at 497. Thus, even while holding that the statutory limits on PAC independent expenditures were unconstitutional, the Court reiterated that "[i]n *NRWC* we rightly concluded that Congress might include, along with labor unions and corporations traditionally prohibited from making contributions to political candidates, membership corporations, though contributions by the latter might not exhibit all of the evil that contributions by traditional economically organized corporations exhibit." *Id.* at 500.

The Court's holding two years later in *MCFL* was fully consistent with the principle—established in *NRWC* and reaffirmed in *NCPAC*—that a non-profit corporation may be prohibited from making candidate contributions except through a separate segregated fund made up of contributions solicited from members for electioneering purposes. In *MCFL*, the Court held that such an organization could not be prohibited from spending its funds on its own independent election-related political speech, but the Court emphasized that *candidate contributions* were a different matter:

> *National Right to Work Committee* does not support the inclusion of MCFL within § 441b's prohibition on

direct independent spending. That case upheld the application to a nonprofit corporation of a different provision of § 441b: the limitation on who can be solicited for contributions to a political committee. However, the political activity at issue in that case was contributions, as the committee had been established for the purpose of making direct contributions to political candidates. 459 U.S., at 200. We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending. *NCPAC*, 470 U.S. 480 (1985); *California Medical Assn. v. FEC*, 453 U.S. 182, 194, 196-197 (1981); *Buckley*, *supra*, at 20-22.

In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient in *National Right to Work Committee* to support a limitation on the ability of a committee to raise money for direct contributions to candidates.

MCFL, 479 U.S. at 259-60; *see also id.* at 261-62 ("As we have noted above, however, the Government enjoys greater latitude in limiting contributions than in regulating independent expenditures.").

In short, *NRWC* held that it is constitutional to require an ideological non-profit corporation that wishes to make contributions to political candidates to use a separate segregated fund, with contributions solicited only from members, and nothing in *MCFL*'s discussion of independent *expenditures* suggested any retreat from that holding with respect to *contributions*. Nor do any of this Court's subsequent rulings call into question the prohibition on direct corporate contributions to candidates. Indeed, those decisions only underscore the general legitimacy of restrictions on campaign contributions. *See, e.g., Nixon v. Shrink Missouri PAC*, 528 U.S. at 395-96; *compare Colorado I*, 518 U.S. at 615 (opinion of Breyer, J.) (rejecting limits on independent expenditures by political parties), *with Colorado II*, 533 U.S. at 447 (sustaining limits on contributions and coordinated expenditures by political parties). This Court's precedents thus provide no support for—and, indeed, rule out—the Fourth Circuit's extension of *MCFL* to candidate contributions.

II. PROHIBITING *MCFL* CORPORATIONS FROM MAKING DIRECT CANDIDATE CONTRIBUTIONS IMPOSES MINIMAL BURDENS ON SPEECH AND ASSOCIATION BUT SERVES IMPORTANT GOVERNMENTAL INTERESTS.

Even if controlling precedents of this Court did not clearly establish the constitutionality of applying the contribution restrictions of 2 U.S.C.§ 441b to non-profit ideological organizations, reversal of the Fourth Circuit's decision would still be necessary in light of the insubstantial burdens that those restrictions impose on First Amendment interests and the important interests the restrictions serve. The application of 2 U.S.C. § 441b to "*MCFL* corporations" does not significantly limit the ability of such corporations and their members to participate in political speech and association.[2] On the other hand, the restriction is necessary to prevent cir-

[2] We use the term "*MCFL* corporations" to refer to ideological non-profit corporations whose independent expenditures qualify for constitutional protection under *MCFL*. The precise boundaries of this category are unclear, and some courts of appeals—particularly the Fourth Circuit in this case—have defined *MCFL* corporations more expansively than did this Court in *MCFL* itself (*see* 479 U.S. at 263-64) and in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 661-65 (1990). Nonetheless, the Solicitor General's Petition for Certiorari in this case did not challenge the Fourth Circuit's holding that respondent North Carolina Right to Life, Inc., qualifies as an *MCFL* corporation even though it has accepted more than *de minimis* contributions from for-profit corporations. *Cf. FEC v. NRA*, 254 F.3d 173, 192 (D.C. Cir. 2001) (organization that accepts more than *de minimis* corporate contributions does not qualify under *MCFL*). We do not agree with the ruling of the Fourth Circuit, but do not contest it here since the issue was not presented in the Petition.

cumvention of the limits on candidate and PAC contributions that this Court has repeatedly sustained, and it thus plays an important role in preventing corruption of the electoral process.

A. The Contribution Restriction Neither Prevents *MCFL* Corporations from Speaking in Their Own Voices Nor Bars Their Members from Contributing to Political Campaigns.

Buckley upheld FECA's contribution limits because they involved "only a marginal restriction upon the contributor's ability to engage in free communication." 424 U.S. at 20. To be sure, *Buckley* involved a contribution limit while this case involves a prohibition on contributions (except through separate segregated funds), but the law's effect on the First Amendment interests of *MCFL* corporations and their supporters remains insubstantial.

To begin with, regardless of the prohibition on direct contributions to candidates, corporations that fall within the protection of *MCFL* retain the unfettered ability to speak out as much as they desire in support of or opposition to candidates for federal office by making independent expenditures for those purposes. *See MCFL*, 479 U.S. at 263. The contribution restriction does not prevent such corporations from saying whatever they wish about candidates—even if saying it costs money. Thus, *MCFL* corporations retain their ability to engage in what the Court has characterized as "'core' First Amendment activity." *Colorado I*, 518 U.S. at 616 (opinion of Breyer, J.).

Similarly, the ability of an *MCFL* corporation to engage in its own independent expenditures gives full scope to its supporters' right to engage in "collective action in pooling their resources to amplify their voices." *NCPAC*, 470 U.S. at 495. Thus, the interest of individuals in joining together to engage in political speech that they could not individually afford is not affected by prohibiting *MCFL* corporations from

making contributions, as opposed to independent expenditures. Unlike the expenditure restrictions struck down in *Buckley* and *MCFL*, the contribution restrictions at issue here do nothing to "preclud[e] … associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection for the freedom of association." *Buckley*, 424 U.S. at 22.

Moreover, to the extent the members or supporters of an *MCFL* corporation wish to associate themselves symbolically with a candidate by giving money to his campaign (as opposed to pooling their resources to engage in independent speech), they remain free to make their own individual contributions to the candidate, subject to FECA limits. *See id.* at 21.[3] From the standpoint of their usefulness in funding the candidate's campaign activities, such individual contributions are just as effective as contributions flowing through the conduit of an *MCFL* corporation: One thousand separate contributions of $1 each from individual members of an *MCFL* corporation provide just as much support to the candidate as one contribution of $1000 funneled through the *MCFL* corporation. Indeed, the only respect in which pooled contributions could be said to be more "effective" than individual ones is that the pooled contributions would have more of a tendency to make the candidate beholden to the influence of an identified special interest group. But that is precisely the evil of corruption (or its appearance) that Congress is entitled to combat through restrictions on campaign contributions. *See Buckley*, 424 U.S. at 26-28; *NRWC*, 459 U.S. at 208;

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[3] The First Amendment rights of an ideological, non-profit membership corporation are largely derivative of the rights of its members, *Colorado II*, 533 U.S. at 448 n.10. Therefore, if the rights of the members to make contributions are not infringed, as *Buckley* holds, the non-profit corporation has no greater rights that require vindication, contrary to what respondent suggests here.

NCPAC, 470 U.S. at 497; *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 390-91.

Finally, to the extent the members of an *MCFL* corporation may have a legitimate, constitutionally protected interest in being able to provide pooled contributions to a candidate, the law provides a mechanism for such contributions: They can be made through a separate segregated fund, or PAC, established by the corporation, which can use unlimited treasury funds to raise money for the PAC and administer it. Although this Court held in *MCFL* that the ability to *speak* through a PAC was not an adequate substitute for the corporation's own ability to engage in core political speech directly, the lesser interest in making *contributions* is not infringed by the requirements that attach to creation and operation of a separate segregated fund. Indeed, that is precisely the holding of *NRWC*. *See also Austin*, 494 U.S. at 660-61.

B. Restrictions on Contributions by *MCFL* Corporations Serve the Important Interest of Preventing Circumvention of Contribution Limits and Avoiding the Appearance of Corruption.

Invalidation of the prohibition on contributions to candidates by *MCFL* corporations would permit such non-profit corporations to become conduits for funneling cash to candidates in ways that would evade and undermine provisions of FECA previously upheld by this Court.[4] In particular, permitting such contributions would allow circumvention of the individual per-candidate and aggregate contribution limits whose validity the Court affirmed in *Buckley v. Valeo*, 424 U.S. at 23-35, 38. Because contributions to non-profit advocacy corporations are unlimited, a contributor who had reached either the per-candidate or aggregate limits for a particular election cycle, but who desired to provide further direct support for a candidate or candidates, could do so by making unlimited contributions to a non-profit corporation that intended to (or was likely to) contribute to the contributor's favored candidates, within the limits of the law, which are now $2000 per candidate for both a primary and a general election.

[4] *See Colorado II*, 533 U.S. at 457-65 (recognizing importance of government's interest in preventing evasion of campaign finance laws.)

In addition, allowing *MCFL* corporations to make candidate contributions would lead directly to circumvention of the limits on contributions to PACs and other political committees upheld in *California Medical Association v. FEC*, 453 U.S. 182. There, the Court recognized the important role that the limits on contributions to PACs play in preventing circumvention of individual contribution limits: without those limits, "an individual or association seeking to evade the … limit on contributions to candidates could do so by channelling funds through a multicandidate political committee." *Id.* at 198 (plurality opinion). Thus, the limits on contributions to PACs are "an appropriate means by which Congress could seek to protect the integrity of the contribution restrictions upheld by this Court in *Buckley*." *Id.* at 199.[5]

Permitting *MCFL* corporations to become conduits for contributions to candidates would effectively allow them to operate as mini-PACs.[6] That would subvert the limits on PAC contributions upheld in *California Medical Association*

[5] Justice Blackmun's concurring opinion in *California Medical Association* similarly emphasized that, to the extent political committees make contributions (as opposed to independent expenditures), they are "essentially conduits for contributions to candidates, and as such they pose a perceived threat of actual or potential corruption" justifying the limits on the amounts that may be contributed to them. *Id.* at 203 (Blackmun, J., concurring in part and in the judgment).

[6] The principal difference would be that *MCFL* corporations would be subject to the $2000 per-candidate contribution limit applicable to individuals rather than the $5000 limit applicable for PACs, since FECA does not provide an exception for them from the general $2000 limit as it does for PACs.

because contributions to non-profit advocacy groups, unlike contributions to political committees, are not subject to any limitations. Moreover, *MCFL* corporations would operate free of the source limitations and disclosure requirements applicable to political committees.

Perhaps most disturbing of all, permitting *MCFL* corporations to make contributions to candidates would cause a breach in the dike that that has long prevented for-profit corporations and labor unions from directly or indirectly making contributions to candidates for federal office.[7] The Fourth Circuit has held in this case and in a previous case involving the same organization (*North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999)), that an organization may qualify as an *MCFL* corporation even if, unlike the organization in *MCFL*, it does not disavow contributions from for-profit corporations, as long as such contributions constitute only a "modest percentage" of its revenue. *Id.* at 714. Under the Fourth Circuit's reading of *MCFL*, a for-profit corporation or labor union may make substantial contributions to a non-profit corporation in the expectation that funds will be passed along to candidates, as long as the non-profit corporation has a large enough budget that the corporate or union contribution represents only a "modest percentage" of the non-profit's funding.[8] Since the Fourth Circuit and some

[7] In light of *NRWC* and *Austin v. Michigan Chamber of Commerce*, the constitutionality of prohibiting for-profit corporations from making candidate contributions is clear. Indeed, *Austin* held that such corporations may be prohibited even from making independent expenditures supporting candidates. Moreover, *Austin* approvingly noted that for-profit corporations may be prohibited from contributing their own funds to PACs (*see* 494 U.S. at 664 n.3), a limitation that would be rendered irrelevant under the Fourth Circuit's expansion of *MCFL*.

[8] As noted above, the Solicitor General has chosen not to challenge the Fourth Circuit's holding that an *MCFL* corporation may accept funding from for-profit corporations. That holding is, to say the least, not unassailable. *See* Brief Amicus Curiae of the Brennan Center for Justice. As long as the Fourth Circuit's interpretation of *MCFL* on this point remains

(*Footnote continued*)

other courts allow an *MCFL* corporation to receive some money from for-profit corporations, the potential exists for evading the ban on contributions by for-profit corporations and undermining the interests that the ban serves. *See MCFL*, 459 U.S. at 207-10; *Austin*, 494 U.S. at 658-61.

Because candidate contributions by corporations have long been prohibited and the lower courts' rulings in this case are the first ever to hold that any corporation has a right to make them, there is no body of experience that directly demonstrates the practical effect that permitting such contributions can be expected to have. "Since there is no recent experience" with such contributions, "the question is whether experience under the present law confirms a serious threat of abuse" if they are permitted. *Colorado II*, 533 U.S. at 457. Here, as in *Colorado II*, "[d]espite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced"—in this case by opening the door to contributions by *MCFL* corporations. *Id.*

Experience under existing laws shows that non-profit organizations are increasingly pushing the limits of permissible electioneering activities. For example, amicus curiae Public Citizen has documented how one non-profit, United Seniors Association, has used millions of dollars of corporate backing to fund "issue advertisements" that stop just short of express advocacy in support of candidates favored by the

standing, however, the potential that a non-profit corporation's candidate contributions may be conduits for the cash of for-profit corporations must be considered in assessing the possible impact of allowing *MCFL* corporations to make candidate contributions.

pharmaceutical industry.[9] Other examples of non-profits funneling corporate monies into electioneering activities abounded in the recent congressional elections.[10]

Prohibitions on "soft money" contributions to the national parties in the new Bipartisan Campaign Reform Act have escalated the trend, as the flow of money has been diverted from the parties to other organizations, including not only PACs but also non-profit advocacy organizations that engage in election-related expenditures and that are not covered by the 2002 Act.[11] These developments leave no room for doubt that if a loophole is opened allowing ideological non-profit corporations to contribute directly to candidates, the money will follow.

CONCLUSION

Broader issues in the field of campaign finance reform await this Court in the case testing the many provisions of the Bipartisan Campaign Reform Act. This case, however, does

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[9] Public Citizen's reports can be found on its website at http://www.citizen.org/congress/campaign/special_interest/articles.cfm?ID=7999 and http://www.citizen.org/documents/usaupdate.pdf.

[10] *See, e.g., Campaign Notebook: More Help Than Morella Wants*, Wash. Post, Oct. 3, 2002, at B4 ("A nonprofit group funded in part by the pharmaceutical industry is urging voters in Maryland's 8th Congressional District to call Rep. Constance A. Morella and thank the Republican for voting for the industry-backed GOP plan to make prescription drugs more available to seniors."); *see also* http://www.citizen.org/congress/articles.cfm?ID=8495 (Public Citizen report documenting campaign expenditures of and contributions to non-profit "527 groups").

[11] *See* Thomas B. Edsall, *Campaign Money Finds New Conduits as Law Takes Effect; Shadow Organizations to Raise "Soft Money,"* Wash. Post, Nov. 5, 2002, at A2; Thomas B. Edsall, *New Ways to Harness Soft Money in Works; Political Groups Poised to Take Huge Donations*, Wash. Post, Aug. 25, 2002, at A1; Thomas B. Edsall & Juliet Eilperin, *PAC Attack II: Why Some Groups Are Learning to Love Campaign Finance Reform*, Wash. Post, Aug. 18, 2002, at B2; Juliet Eilperin, *After McCain-Feingold, A Bigger Role for PACs; Groups May Be "Soft Money" Conduits*, Wash. Post, June 1, 2002, at A1.

not raise those issues, nor is there any reason for the Court to use this case to rethink its campaign finance jurisprudence from first principles. Rather, the narrow but important issue posed by this case can be resolved on the basis of thirty years of settled law dictating that the judgment of the Fourth Circuit be reversed.

For the foregoing reasons, the Fourth Circuit's judgment that 2 U.S.C. § 441b(a)'s prohibition on corporate campaign contributions may not be enforced against respondent North Carolina Right to Life, Inc., should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

—v.—

CHRISTINE BEAUMONT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONER

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Buckley v. Valeo, 424 U.S. 1 (1976) 3, 12

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 8, 9, 11

Faucher v. FEC, 743 F. Supp. 64 (D. Me. 1990) 8

FEC v. Colo. Repub. Fed. Campaign Comm.,
533 U.S. 431 (2001) 12

FEC v. Mass. Citizens for Life, Inc.,
479 U.S. 238 (1986) . . . . . *passim*

FEC v. Nat'l Right to Work Comm.,
459 U.S. 197 (1982) 6, 11

FEC v. Nat'l Rifle Ass'n,
254 F.3d 173 (D.C. Cir.2001) 8, 9, 10, 12 n.6, 17

FEC v. Survival Educ. Fund, Inc.,
65 F.3d 285 (2d Cir. 1995) 8, 9

N.C. Right to Life, Inc., v. Bartlett,
168 F.3d 705 (4th Cir. 1999) . . . . . 2, 8, 10 & n.5, 11

Pipefitters Local Union No. 562 v. United States,
407 U.S. 385 (1972) 6

Authorities Cited

United States v. UAW-CIO, 352 U.S. 567 (1957) 6

Statutes and Regulations:

Federal Corrupt Practices Act, Pub. L. No. 59-36, 34 Stat. 864 (1907) 5

Labor Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159 (1947) 6

11 C.F.R. § 114.10 8

Other Authorities:

Independent Sector, *The New Nonprofit Almanac IN BRIEF* available online at http://www.independentsector.org/PDFs/inbrief.pdf (2001) 13, 16

LifeLine Communications, "LifeLine Communications," *at* http://www.lifeline.net (HTML source, description metatag) (last visited Dec. 27, 2002) 10 n.5

Opening Brief for Plaintiff NRA at 2, *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), *available at* http://www.camlc.org/advocacy-court2-34.html 14

Decl. of Steven T. Kirsch, *McConnell v. FEC*, Civ No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), *available at* http://www.camlc.org/advocacy-court2-31.html 14 n.7

N.C. Right to Life, "The Organization," http://www.ncrtl.org/organization/ (last visited Dec. 27, 2002) 18

INTEREST OF THE *AMICUS CURIAE*

With the consent of the parties, the Brennan Center for Justice at NYU School of Law submits this brief *amicus curiae* in support of the Petitioner.[1] The letters of consent have been filed with the Clerk of the Court.

The Brennan Center is a nonpartisan institute dedicated to a vision of inclusive and effective democracy. The Center unites the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts, legislatures, and citizens in developing practical solutions to difficult problems in areas of special concern to Justice William J. Brennan, Jr. The Center has participated as *amicus curiae* or as counsel for a party or *amici* in a number of campaign finance cases decided by this Court, including *FEC v. Colorado Republican Federal Campaign Committee* (*I* and *II*) and *Nixon v. Shrink Missouri Government PAC*, and is part of the legal team defending the Bipartisan Campaign Reform Act in *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), which is expected to reach this Court on appeal later this term. The Center takes an interest in this case because the Fourth Circuit's relaxed interpretation of *FEC v. Massachusetts Citizens for Life, Inc.* creates a serious risk that corporations and unions will exploit nonprofit organizations to circumvent electioneering bans of long standing and clear constitutionality.

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[1]Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authorized this brief in whole or in part and that no person or entity other than *Amicus*, its members, and its counsel contributed monetarily to the preparation or submission of this brief.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

A bedrock principle of federal campaign finance law is that corporate and union money should not be allowed to influence candidate elections. Congress banned corporations from contributing to campaigns nearly a century ago. More than 50 years ago, Congress added an additional prohibition on corporate expenditures on behalf of federal candidates and extended these prohibitions to unions as well. This Court has repeatedly recognized the constitutionality of these restrictions, even as applied to nonprofit corporations, carving from them only a narrow exception in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"). *MCFL* permits electioneering expenditures exclusively by small, ideological nonprofits with, among other things, policies against accepting corporate or union donations. *See id.* at 263-64.

This Court's holding in *MCFL* clearly and unambiguously authorized only expenditures, not campaign contributions, and applied only to nonprofit corporations that have policies against accepting any corporate or union donations. Notwithstanding those express limitations, the Fourth Circuit has now *twice* expanded the exemption for nonprofit electioneering. First, *North Carolina Right to Life, Inc., v. Bartlett* allowed a nonprofit that *does* accept corporate or union contributions to benefit from the exception. *See* 168 F.3d 705, 714 (4th Cir. 1999). Second, *Beaumont v. FEC*, now subject to this Court's review, permitted that nonprofit to make not only independent expenditures but also contributions directly to campaigns. *See* 278 F.3d 261, 277 (4th Cir. 2002). Where *MCFL* rightly carved out a narrow exception for expenditures by nonprofit corporations that neither pose a direct threat of corruption nor potentially serve as conduits for corporate or union wealth, the

Fourth Circuit's interpretations create loopholes that threaten to undermine the integrity of the federal campaign finance system.

Extending *MCFL* to include contributions as well as expenditures opens opportunities for circumvention of campaign contribution limits that have been upheld as constitutional since *Buckley v. Valeo*, 424 U.S. 1 (1976). Under the Fourth Circuit rulings, a wealthy donor who has already contributed the maximum permitted amount to favored candidates can then give an unlimited amount to *MCFL* organizations that funnel the money to the same candidates. Even more troubling, corporations and unions that are barred from electioneering can launder their treasury funds through those organizations and exert otherwise unlawful influence on federal candidates.

The Brennan Center supports the Petitioner in seeking reversal of the Fourth Circuit's decision in *Beaumont*. This Court's decisions plainly foreclose the *Beaumont* court's second expansion of the *MCFL* exception. The Center submits this brief *amicus curiae* to urge this Court to reaffirm the explicit, original contours of that exception and, in closing the loophole opened in *Beaumont*, also to confirm specifically that nonprofits are entitled to the benefit of an *MCFL* exemption only if they accept no corporate or union funding.

In other words, this Court should use this opportunity to insist that *MCFL* meant what it said. Although this Court has consistently held that *MCFL* groups may accept no corporate or union money, several courts of appeal in addition to the Fourth Circuit have adopted more permissive standards. Some circuits extend the *MCFL* exemption to groups that receive less than a certain absolute dollar amount of corporate or union contributions. The Fourth Circuit treats as *MCFL* organizations groups that receive only a "modest" percentage of their revenue

from corporations or unions. In deciding this case, this Court should firmly reject both of these misinterpretations of *MCFL* and reaffirm that *MCFL* groups may accept no corporate or union money.

Only a complete ban on corporate and union contributions to *MCFL* organizations would prevent corporations and unions from funneling millions of dollars through nonprofit groups into electioneering activities.[2] The Fourth Circuit's rule would allow some groups to accept millions of dollars of corporate or union money, which could be used for independent expenditures or even given directly to candidates' campaigns. The amount-based rules adopted by other circuits, while opening smaller loopholes than the Fourth Circuit's approach, would still subject federal law to extensive manipulation and circumvention. Only by reiterating the basic principle that *MCFL* applies exclusively to organizations that accept no corporate or union contributions can this Court protect federal elections from the influence of vast aggregations of corporate and union money.

[2]Nonprofit groups receive hundreds of billions of dollars annually, and some individual nonprofit groups receive more than $100 million. Even small percentages of those amounts would be millions of dollars. For a detailed discussion, see Point II.A, *infra*.

ARGUMENT

I.

CIRCUIT COURT INTERPRETATIONS OF *MCFL* IGNORE THIS COURT'S CLEAR RULINGS.

Federal campaign finance law categorically bans the use of corporate and union money to influence candidate elections. This Court recognized a narrow exception to this rule in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), permitting nonprofit corporations that do not accept funds from corporations or unions to make campaign expenditures (but not contributions). In *Austin v. Michigan Chamber of Commerce*, this Court again stressed that nonprofits may make expenditures under the *MCFL* exemption only if they have a policy against accepting corporate or union donations. *See* 494 U.S. 652, 664-65 (1990). Subsequent circuit court opinions expanding the *MCFL* exception defy the plain holdings of this Court's precedents.

A. This Court Has Consistently and Unambiguously Restricted the *MCFL* Exception to Nonprofits That Refuse Corporate and Union Contributions.

To guard against the real and perceived corrupting influence of aggregations of wealth on elected officials and electoral processes, federal campaign finance law has long relied on an outright ban on the use of corporate and union treasury funds for electioneering purposes. Corporations have been barred from contributing to federal campaigns since 1907. *See* Federal Corrupt Practices Act, Pub. L. No. 59-36, 34 Stat. 864-65 (1907). Congress extended the ban to unions in 1947 and broadened the restriction to prohibit corporate or union expenditures to influence a federal election. *See* Labor

Management Relations Act of 1947, Pub. L. No. 80-101, § 304, 61 Stat. 159. In upholding campaign finance restrictions against constitutional challenges, this Court has repeatedly acknowledged the compelling state interests that these laws serve. *See Austin*, 494 U.S. at 658-61; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209-10 (1982); *see also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 415-16 (1972) (noting that Congress barred labor unions from making campaign expenditures in order to "eliminate the effect of aggregated wealth on federal elections"); *United States v. UAW-CIO*, 352 U.S. 567, 578-79 (1957) (detailing congressional intent behind the proscription on electoral activity funded from the "huge war chests being maintained by labor unions").

The Court carved out a narrow exception from these bans in *MCFL*. The plaintiff in that case, Massachusetts Citizens for Life, Inc. ("MCFL"), was a small nonprofit corporation that financed its political advocacy entirely with individual donations, solicited in part through "various fundraising activities such as garage sales, bake sales, dances, raffles, and picnics." 479 U.S. at 242. The *MCFL* Court noted that such organizations "may not find it feasible to establish" a political action committee ("PAC") through which to finance campaign expenditures, because "[d]etailed record-keeping and disclosure obligations, along with the duty to appoint a treasurer and custodian of the records, impose administrative costs that many small entities may be unable to bear." *Id.* at 254-55 & n.8. Recognizing the First Amendment burden that the ban on corporate expenditures placed on nonprofits like MCFL, and pointedly noting that MCFL's policy of not accepting corporate or union funding "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace," the *MCFL* Court ruled that small, ideological nonprofit corporations that receive no corporate or

union support are constitutionally exempt from the general ban on corporate expenditures in federal elections. *Id.* at 264.[3]

MCFL unambiguously delineates three characteristics that qualify a nonprofit for an exemption from the ban on using corporate treasury funds for campaign expenditures. An *MCFL* nonprofit must be "formed for the express purpose of promoting political ideas" and cannot engage in any business activities. *Id.* Second, it must have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings." *Id.* Finally, but most importantly for this case, an *MCFL* nonprofit must have a "policy not to accept contributions" from business corporations or labor unions and must not be established or controlled by such an entity. *Id.* This Court described all three of those features as "essential to [its] holding." *Id.* at 263.

This Court reaffirmed in *Austin* that a nonprofit's entitlement to the *MCFL* exception depends on a policy against accepting corporate contributions. *See Austin*, 494 U.S. at 664-65. The *Austin* Court rejected the Michigan State Chamber of Commerce's argument that it ought to be treated as an *MCFL* organization, stressing that the factors enumerated in *MCFL* were "essential" and that the Constitution does not require exempting nonprofit organizations that do "not share these *crucial* factors." *Id.* at 662 (emphasis added). The *Austin* Court specifically considered the ability of business corporations to "circumvent . . . restrictions by funneling money through the Chamber's general treasury" and noted that if groups like the Chamber were excepted, they could "serve as a conduit for

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[3]The Court also stressed the important distinction between campaign expenditures, which *MCFL* organizations may make, and contributions, which they may not. *See* 479 U.S. at 259-60 (distinguishing *Nat'l Right to Work Comm.*).

corporate political spending." *Id.* at 664. While the Chamber received extensive funding from corporations, *Austin*'s concern about preventing nonprofits from transforming *MCFL*'s narrow exception into a gaping loophole also applies in the case now before this Court.

In sum, both *MCFL* and *Austin* define a very limited exception in wholly unambiguous terms. *See Faucher v. FEC*, 743 F. Supp. 64, 69 (D. Me. 1990) ("In *FEC v. Massachusetts Citizens for Life*, the Supreme Court made clear that one of the 'essential' factors for its holding was that the nonprofit corporation there did not receive, *and had a policy of not receiving*, any corporate funds."). The FEC has in turn codified the three unambiguous criteria for the exemption in regulations that safeguard the general, long-standing rule that corporate and union treasury funds may not be used for electioneering, regardless of whether they pass through intermediaries. *See* 11 C.F.R. § 114.10. To prevent widespread circumvention of that rule, this Court should now reaffirm its prior unequivocal holdings.

B. Appellate Courts Have Misinterpreted *MCFL* to Allow Exemptions for Nonprofits That Do Accept Corporate or Union Money.

Increasingly, lower federal courts have disregarded the plain language of this Court's decisions and have arrogated to themselves the authority to expand the scope of the *MCFL* exception. *See FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001); *N.C. Right to Life, Inc., v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999); *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). The Second and Eighth Circuits allow nonprofits the benefit of the exemption as long as they do not receive "any significant contributions" from corporations or unions, without

clarifying what "significant" means. The D.C. Circuit also adopted this approach but fixed a specific annual cap on the amount that may be received. The Fourth Circuit invented an even more lax standard, applying the *MCFL* exception to groups that receive only a "modest percentage" of their income from corporations and unions. All of these interpretations contradict this Court's prior holdings and defeat their purpose.

The Second and Eighth Circuits have both stated that whether a group should be covered by the *MCFL* exception depends on whether it receives "any significant contributions" from corporations or unions. *Survival Educ. Fund*, 65 F.3d at 292; *Day*, 34 F.3d at 1364-65. While neither opinion clearly explains how to determine whether contributions are "significant," the statement that courts "should focus upon the amount" of corporate or union money received inherently implies an absolute standard, rather than a percentage of the group's revenues. *Survival Educ. Fund*, 65 F.3d at 292 (internal quotation marks omitted). Whatever that sum may be, it can be funneled in its entirety through the nonprofit advocacy group into federal political races.

The D.C. Circuit adopted the clearest version of this amount-based rule, concluding that the National Rifle Association qualified for the exception in a year when it received $1,000 from corporations, but did not qualify in other years when it received $7,000 or $39,000.[4] *NRA*, 254 F.3d at

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[4]Although the D.C. Circuit's test is clearer than the other standards, its year-by-year application is an invitation to abuse. Not only will it impose insuperable obstacles to enforcement, but this approach would also allow a group to accept unlimited amounts of corporate or union money in one year, save the money as a budgetary surplus, and then spend the money on electioneering in a subsequent year when the organization received only small amounts of corporate or union money. The two-year federal election cycle makes this threat particularly severe. The *MCFL* exception should

192. In adopting this rule, the D.C. Circuit specifically rejected the argument that the percentage of a group's revenues from corporations or unions should determine whether the group qualified for the *MCFL* exemption. *Id.* The D.C. Circuit correctly recognized that a percentage-based rule would allow wealthy nonprofits like the NRA to serve as conduits for large amounts of corporate and union money.

The Fourth Circuit's construal of *MCFL* is the loosest and most subject to abuse of any of the appellate court interpretations. The Fourth Circuit allows ideological nonprofit corporations to claim the *MCFL* exemption so long as corporate or union donations represent what the court characterized as a "modest percentage" of the nonprofit's total revenues. *Bartlett*, 168 F.3d 705, 714. *Bartlett* held that eight percent was not a substantial portion of North Carolina Right to Life's revenue, *id.*, but gave no indication of what percentage would disqualify a nonprofit group from invoking the *MCFL* exception.[5]

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apply only to groups that make it a policy to refuse corporate and union support.

[5]The Fourth Circuit also suggested that the corporate contributions to North Carolina Right to Life should be given special campaign finance treatment, because they come from LifeLine Communications, which describes itself as "a global telecommunications company dedicated to supporting your favorite Christian ministries," LifeLine Communications, "LifeLine Communications," *at* http://www.lifeline.net (HTML source, description metatag) (last visited Dec. 27, 2002), and allows its customers to designate recipients for its donations. *See Beaumont*, 278 F.3d at 273; *Bartlett*, 168 F.3d at 714. LifeLine's contributions should be treated the same as those of any other corporation that uses well-publicized philanthropy to build good will among consumers. LifeLine determines the size of donations, creates the list of eligible recipients, and receives the benefit of any tax deduction.

Treating contributions through telephone plans, credit cards, or similar programs as individual rather than corporate contributions would further widen the loopholes that the Fourth Circuit has already opened. Because the contributions are not tracked to the individual consumers, the donors could circumvent campaign contribution limits by funneling the money through the corporate program. The consumer and the corporation could each launder the other's connection from the money: For purposes of the ban on corporate contributions, the money would be treated as the consumer's individual contribution, while for purposes of individual contribution limits, the donation would be treated as coming from the corporation. To prevent manipulations like this and accurately to categorize donations, LifeLine's corporate "Give Back" program and others like it should be treated as corporate contributions.

The express terms of *MCFL* refute the lower courts' expansive interpretations. In carving its carefully circumscribed exception for MCFL, this Court insisted that the plaintiff had "three features essential to [its] holding" in the case. *MCFL*, 479 U.S. at 263. The decision therefore cannot reasonably be interpreted merely as "an application, in three parts, of First Amendment jurisprudence to the facts." *Bartlett*, 168 F.3d at 714 (quoting *Day*, 34 F.3d at 1363). A policy against accepting corporate or union contributions "prevents [*MCFL* organizations] from serving as conduits for the type of direct spending that creates a threat to the political marketplace," *MCFL*, 479 U.S. at 264, and maintains the traditional rule that corporations and unions can neither contribute to nor spend treasury funds on behalf of federal political campaigns. *See Austin*, 494 U.S. at 661; *Nat'l Right to Work Comm.*, 459 U.S. at 209-10. This Court's unambiguous, categorical requirements foreclose the relaxed approaches advanced by the courts of appeals.[6]

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[6]In addition to contradicting this Court's precedent, the Fourth Circuit rule is inconsistent with the rule of the D.C., Second, and Eighth Circuits. Indeed, the D.C. Circuit expressly considered and rejected *Bartlett*'s holding as inconsistent with *MCFL*'s concerns about preventing nonprofits from serving as conduits for corporate money. *See NRA*, 254 F.3d at 192. Furthermore, the vague standards proposed by the circuit courts, other than the D.C. Circuit, invite extensive litigation to determine whether an organization receives substantial revenue from corporate or

II.

THIS COURT SHOULD REAFFIRM THAT IT MEANT WHAT IT SAID IN *MCFL*.

As has been demonstrated repeatedly, perhaps most notably through the recent but overwhelming deluge of soft money, political groups exploit even small leaks in the campaign finance framework until a trickle of evasion becomes a flood, undercutting the entire campaign finance structure. By creating a loophole that allows some corporate and union money to be spent on campaign expenditures, the circuit courts identified above allow clever manipulations to eviscerate the limits on corporate and union electioneering. Prior decisions of this Court uniformly recognized that the danger of circumvention of valid campaign finance regulations provides a compelling reason for prophylactic rules. *See, e.g., FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001); *Austin*, 494 U.S. at 664; *Buckley v. Valeo*, 424 U.S. 1, 38 (1976). This Court should eliminate the risk of evasion presented by the circuit courts' loopholes by firmly reiterating that *MCFL* carved out an exception only for grassroots organizations that could not serve as conduits for any corporate or union treasury funds.

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union sources. *See NRA*, 254 F.3d 173 (resolving issue of whether NRA qualified for *MCFL* exception nearly 20 years after receipt of the corporate funds). The burden such a regime would place on the FEC would make fair and effective enforcement difficult, if not impossible.

A. Extending the *MCFL* Exemption to Nonprofits That Accept a "Modest" Percentage of Their Revenues from Corporations and Unions Potentially Allows Millions of Dollars of Corporate and Union Money to Flow into Federal Electioneering.

Any standard based on a percentage of income would demolish the principle that corporate and union money should not be used in federal election campaigns. The nonprofit sector, even when limited to ideological organizations, is sufficiently large to allow corporations and unions to pass large sums into federal electioneering, regardless of what percentage limit applies. Under the Fourth Circuit's rule, the National Rifle Association alone would be able to accept more than $10 million from corporate or union treasury funds to finance electioneering. As the political system adjusted to that rule, the loophole would grow even larger.

Nonprofit organizations that are tax-exempt under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code and religious congregations received $664.8 billion in 1997, the last year for which such figures were available. *See* Independent Sector, *The New Nonprofit Almanac IN BRIEF* at 7, available online at http://www.independentsector.org/PDFs/inbrief.pdf (2001). Approximately 11 percent of the organizations counted were, like respondent North Carolina Right to Life, social welfare organizations under section 501(c)(4), which are frequently advocacy organizations. *See id.* at 7. Although it is not possible to calculate the precise effect of the Fourth Circuit's rule, even conservative estimates show that it could allow vast quantities of corporate and union money to influence federal campaigns. If even one percent of the nonprofit sector's annual revenue ($6.6 billion out of the $664.8 billion total) flowed to nonprofits satisfying the Fourth Circuit's rule, more than $500 million of corporate or union money (eight percent

of $6.6 billion) could be spent on otherwise unlawful electioneering.

If this estimate appears farfetched, consider the following example. In 2000, the National Rifle Association received approximately $385,000 from corporate donors, as compared to individual contributions of $140 million. Opening Brief for Plaintiff NRA at 2, *McConnell v. FEC*, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), *available at* http://www.camlc.org/advocacy-court2-34.html. The NRA therefore should not qualify for an *MCFL* exemption from the federal ban on corporate electioneering. Under the Fourth Circuit's interpretation of *MCFL*, however, the NRA would not only qualify for the exemption but could also accept an additional $12 million of corporate or union contributions to spend in federal campaigns. Under the Fourth Circuit's rules, organizations like the NRA could become giant laundries – taking in large aggregations of corporate and union money, washing away campaign finance restrictions, and then funneling the money into campaigns for federal office.

Moreover, the money that could be laundered through nonprofits from their current revenue streams would likely represent only the tip of the iceberg. Under the Fourth Circuit rule, wealthy individual donors could leverage their political influence by giving to nonprofit groups that engage in electioneering.[7] By increasing the nonprofit's revenues from

[7]In recent elections, political parties have encouraged major donors to fund advocacy groups that produce sham issue ads – electioneering advertisements that escape campaign finance regulation. *See, e.g.*, Decl. of Steven T. Kirsch at ¶¶ 6, 10, *McConnell v. FEC*, Civ No. 02-582 (CKK, KLH, RJL) (D.D.C.) (three-judge court), *available at* http://www.camlc.org/advocacy-court2-31.html (testifying that he made six-figure contributions to groups that were running effective ads against George W. Bush, such as the National Abortion Rights Action League, upon the

individual contributions, the wealthy donors would increase the amount of corporate or union money the group could accept, in effect increasing the size of the individual donation by at least eight percent. If the Fourth Circuit rule is left undisturbed, wealthy individuals, corporations, and unions will have every incentive to exploit the new loophole for treasury funds routed through nonprofit advocacy groups: large individual donors could give to nonprofits that participate in electioneering, allowing corporations and unions to give more to those groups, increasing the otherwise prohibited flow of corporate and union funds into federal campaigns.

In addition, corporations and unions can ensure that their contributions to *MCFL* groups operating under the Fourth Circuit rule are used largely, if not entirely, for electioneering. A potential corporate or union donor could identify nonprofits committed to electing certain candidates before deciding where to send its funds. The nonprofit, informed by the corporation or union of their mutual electoral interest, would in turn have every reason to use the new corporate or union funds to influence the relevant elections. If the money flowed elsewhere, the donor could simply give its next donation to a nonprofit that would use the money for campaign purposes. Even without explicit earmarking of contributions, or any misconduct by donor or recipient, nonprofit groups could thus become direct conduits for corporate and union money because allowing themselves to serve as conduits would also further

advice of national Democratic Party). The ability to direct large aggregations of wealth to such purposes, or to make unlimited contributions to political parties, may explain why the loopholes created by the relaxations of *MCFL* have not yet been exploited more widely. But as the Bipartisan Campaign Reform Act closes down the soft money option and brings sham issue advocacy within the scope of federal campaign finance law, the parties and their donors are likely to seize on the Fourth Circuit's rule, accelerating evasion, albeit in a new form.

their political missions. The Fourth Circuit rule thus promises not only to corrupt federal elections but also to undermine the integrity of nonprofits that otherwise serve an important role in enhancing political debate.

In sum, whereas this Court has explicitly required that nonprofit corporations refuse all corporate and union contributions to avail themselves of the *MCFL* exception, the Fourth Circuit rule would allow hundreds of millions of dollars of corporate and union money to flow through nonprofit conduits into federal campaigns. Allowing the Fourth Circuit's rule to stand would undermine the principle that the vast aggregations of wealth amassed by corporations and unions ought not enter the political arena. This Court should reverse the opinion below and make clear that *MCFL* organizations can accept no corporate or union donations.

B. Extending the *MCFL* Exemption to Nonprofits That Accept a Limited Total Amount of Corporate or Union Funds Also Invites Circumvention of Federal Campaign Finance Law.

Even standards such as those adopted by the D.C., Second, and Eighth Circuits allow easy circumvention of the rules barring corporations and unions from electioneering. With the current number of nonprofit advocacy organizations, millions of dollars of corporate and union treasury funds would flow into the federal electoral system. As qualifying groups restructured to take advantage of the new rule, the amount of money would increase dramatically.

The Internal Revenue Code exempts approximately 140,000 nonprofit corporations from taxation under section 501(c)(4). *See* Independent Sector at 7. While it is impossible to determine how many of those organizations would be eligible

for an *MCFL* exception under a rule capping the absolute amount of permissible corporate or union support, applying the rule to even a fraction of the 140,000 could allow tens of millions of corporate or union dollars to be spent on federal campaigns. If the general rule allowed more than the $1,000 permitted by the D.C. Circuit in *NRA*, the amount of corporate and union money passing into the federal electoral system could easily reach hundreds of millions of dollars.

A standardized limitation based on absolute size of donations would likely prompt widespread reorganizations that would eliminate any meaningful restrictions. If the law restricts an *MCFL* corporation to receiving up to $1,000 in corporate or union funds, the organization can simply split in two and accept a total of $2,000. Statewide organizations such as North Carolina Right to Life could reorganize and incorporate at the county or municipal level, making each of the new organizations eligible to receive the full maximum amount consistent with its status as an *MCFL* organization. Alternatively, a wealthy corporate executive could finance a newly incorporated nonprofit advocacy group with a personal donation, have the corporation make an appropriately sized contribution from its treasury funds, and funnel all of the corporate money and much of the remaining funds directly into federal elections. The proliferation of qualifying organizations would defeat the limit on how much corporate or union money could be furnished for federal electioneering.

The D.C. Circuit justified applying *MCFL* to groups that receive small amounts of corporate or union money by saying that the donations were "de minimis." *NRA*, 254 F.3d at 179. As this Court implicitly recognized in articulating the three-part *MCFL* test, however, preventing an electioneering organization from accepting truly de minimis sums of corporate or union money violates no constitutional right. Moreover, even de

minimis sums of money, in the aggregate, do matter for the campaign finance structure. This Court should reaffirm that its requirement in *MCFL* of a "policy not to accept contributions from [corporations and unions]" means what it says and does not allow individual small leaks collectively to flood campaigns for federal office. *MCFL*, 479 U.S. at 264.

C. If This Court Weakens *MCFL* by Declining to Enforce a Complete Ban on Corporate or Union Financing of Nonprofit Electioneering, the Expanded Exception Should Be Limited to Small Nonprofits.

If this Court decides to change the *MCFL* standard to allow ideological nonprofit groups to accept some corporate or union money and still benefit from the exemption, *MCFL*'s benefits should be limited to small organizations. The original *MCFL* exception was created at least in part out of concern about the complexity and expense of setting up a separate PAC. *See MCFL*, 479 U.S. at 254-55 (plurality op.); *id.* at 265-66 (O'Connor, J., concurring). That concern is not relevant to groups like North Carolina Right to Life, which already maintains both a PAC and a 501(c)(3) educational charity in addition to the core 501(c)(4) organization, *see* North Carolina Right to Life, "The Organization," http://www.ncrtl.org/organization/ (last visited Dec. 27, 2002), let alone to organizations like the NRA, with its $140 million budget and $13 million PAC. *MCFL*'s reference to the picnics and bake sales that MCFL used to raise money establishes that this Court was not contemplating an exception from campaign finance restrictions for the wealthy political advocacy groups that would be the chief beneficiaries of the Fourth Circuit's expansive rule.

CONCLUSION

For the reasons stated by Petitioner and other supporting *amici*, the decision below should be reversed. In reversing that decision, this Court should also reaffirm that the *MCFL* exception applies only to nonprofit corporations that accept no donations from corporations or unions. Percentage-based rules like the one applied by the Fourth Circuit, or even rules that limit *MCFL* organizations to an absolute amount of corporate or union funding, would allow corporations and unions to funnel millions of dollars through nonprofit groups into federal elections. This Court should make clear that *MCFL* applies only to expenditures, not to contributions, and then only to expenditures made by organizations that refuse all donations from corporations or unions.

Dated: January 9, 2003

Respectfully submitted,

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IN THE

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF REALCAMPAIGNREFORM.ORG, INC., CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, GUN OWNERS OF AMERICA, INC., ENGLISH FIRST, AND U.S. JUSTICE FOUNDATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The *amici curiae*, RealCampaignReform.org, Inc., Conservative Legal Defense and Education Fund, Gun Owners of America, Inc., English First, and U.S. Justice Foundation, are nonprofit educational organizations sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] All of these *amici* were established for public education purposes related to participation in the public policy process, and are tax-exempt under Section 501(c)(3) or Section 501(c)(4) of the Internal Revenue Code.

For each of the *amici*, such purposes include programs to conduct research, and to inform and educate the public, on important issues of national concern, including questions related to fidelity to the original text of the United States Constitution, including its several Amendments. The First Amendment issues presented in this case directly impact the right of individuals and organizations to express their views on educational, social and political topics and issues and are of great interest and importance to these *amici*. In the past, these *amici* have filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving constitutional issues.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to the preparation or submission of this brief.

[2] *Amici* requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

STATEMENT OF THE CASE

Respondents, North Carolina Right to Life ("NCRL"), its officers, and an eligible North Carolina voter (collectively "Beaumont") filed a legal challenge to 2 U.S.C. 441b(a) of the Federal Election Campaign Act of 1971, as amended, ("FECA") and two implementing regulations adopted by the Federal Election Commission ("FEC"), 11 C.F.R. §§ 114.2(b) and 114.10, which make it "unlawful ... for any corporation whatever ... to make a contribution or expenditure in connection with any election" for federal office. The regulations include an exemption for independent expenditures by certain nonprofit corporations as required by FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("MCFL").

At trial and on appeal, the FEC argued that NCRL should not be permitted to make independent expenditures because NCRL allegedly did not match certain specific factors identified by this Court in MCFL. Both the trial court and the Fourth Circuit held that the MCFL factors were illustrative rather than absolute and that NCRL was sufficiently like MCFL to require a similar exemption. In its petition for certiorari, the FEC expressly conceded this point.

The trial court and the Fourth Circuit also each ruled that under this Court's reasoning in MCFL, NCRL presented no significant risk of corrupting the federal election process through campaign contributions. Thus, each held that NCRL was also entitled to an exemption from the prohibition against corporate campaign contributions in federal elections.

SUMMARY OF ARGUMENT

The court of appeals' opinion, that the ban of 2 U.S.C. Section 441b(a) on corporate contributions in federal elections is unconstitutional, should be affirmed. With respect to nonprofit advocacy corporations, there is no legitimate distinction between expenditures and contributions. Thus, the rule of FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) ("MCFL"), governs this case.

Further, the Congressional prohibition against contributions and expenditures by corporations in federal elections embodied in 2 U.S.C. Section 441b(a) and associated FEC regulations violates the freedom of the press. Section 441b(a) constitutes an integral component of a comprehensive licensing system governing core political speech, and, as such, it operates as an unconstitutional prior restraint and discriminatory burden in violation of the freedom of the press. In addition, as an integral component of a comprehensive licensing system governing core political speech, 2 U.S.C. Section 441b(a) grants to the FEC unconstitutional editorial control in violation of the freedom of the press.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THE MCFL ISSUE, AND THE FEC'S RELIANCE ON THE NRWC DECISION IS MISPLACED.

The FEC and the dissent below rely upon FEC v. National Right to Work Committee ("NRWC"), 459 U.S. 197 (1982), for the proposition that this Court has conclusively held that an MCFL-type corporation may, consistent with constitutional guarantees, be prohibited from making direct campaign

contributions. But the court of appeals correctly rejected this argument. NRWC, decided four years prior to MCFL, involved a challenge to an FEC decision that NRWC had defined "members" in an impermissible manner, with regard to the rule that only members may be solicited for donations to a corporate affiliated PAC. NRWC stands for the limited proposition that a corporation or unincorporated organization which concedes the applicability of 2 U.S.C. Section 441b may not define the term "member" in such a way as to undermine the limitations of that section. That was the only issue litigated by the parties in that case, and the language of this Court in its opinion should be read with that limited scope in mind.

The court of appeals below correctly rejected the FEC contention that NRWC virtually decided the issue now before the Court. See Beaumont v. FEC, 278 F.3d 262, 276 (4th Cir. 2002). The FEC's position on corporate contributions rests upon a claim, rejected in MCFL, that the potential of "corruption/appearance of corruption" arises whenever an entity uses the corporate form. The court of appeals, like this Court in MCFL, rejected this claim, concluding that the threat of corruption did not arise in the case of an MCFL-type corporation, even with respect to contributions.

Additionally, this Court has recently confirmed that it will subject to strict scrutiny the claimed purpose of a law that directly infringes upon First Amendment freedoms. In Republican Party of Minn. v. White, 536 U.S. ___, 153 L.Ed.2d 694 (2002) ("Rep. Party Minn."), the State attempted to justify a rule limiting campaigns for judicial office as necessary to "preserv[e] the impartiality ... and ... appearance of impartiality of the state judiciary." This Court rejected the State's position, (1) noting that the State was "rather vague ... about what they mean by 'impartiality,'" (2) pointing out that, "although the term is used throughout ... the briefs, ... none of the[] sources

[cited] bother[] to define it," and (3) concluding that "[c]larity on this point is essential...." *Id.*, 536 U.S. ___, 153 L.Ed.2d at 704-05. In light of this ruling, this Court's prior acceptance of Congress' "corruption" rationale for prohibiting campaign contributions by corporations should be re-evaluated. This is particularly pertinent where the ban is based solely upon the corporate form of a particular entity.[3] Thus, despite earlier decisions by this Court accepting the rationale of Congress in enacting the statutory prohibition against corporate contributions in federal elections, there should be no such presumption of corruption or appearance of corruption at least where, as here, there were no findings of corruption or the appearance of corruption, and where corruption should be given its ordinary meaning in the political context.[4] *See* Rep. Party Minn., 536 U.S. at ___, 153 L.Ed. 2d at 705.

II. 2 U.S.C. SECTION 441b(a) VIOLATES THE FREEDOM OF THE PRESS.

Following this Court's lead in Buckley v. Valeo, 424 U.S. 1 (1976), and its progeny, the courts below measured the constitutionality of 2 U.S.C. Section 441b(a) and accompanying regulations, on their face and as applied, **solely** by the First

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[3] Petitioner would argue against any such re-evaluation on the theory that the statute in question (2 U.S.C. Section 441b(a)) "emphatically makes it unlawful for '*any* corporation *whatever*' to make such contributions." Pet. Br. at 18. Yet, as shown in Part II.A. below, Section 441b(a)'s ban on corporate contributions is riddled with exceptions.

[4] In its political sense, "corruption" means the "inducement (of a political official) by means of improper considerations (as bribery) to commit a violation of duty." Webster's Third International Dictionary 512 (3d ed. 1964). *See also* Nixon v. Shrink Missouri Gov't. PAC, 528 U.S. 377, at 422 (2000) (Thomas, J., dissenting) ("[C]orruption ... mean[s] 'perversion or destruction of integrity in the discharge of public duties by bribery or favor.'").

Amendment guarantees of freedom of **speech** and freedom of **association**. *See* Beaumont v. FEC, 278 F.3d 261 (4th Cir. 2002) ("Beaumont III"); Beaumont v. FEC, 2001 U.S. Dist. LEXIS 7704 (E.D.N.C. 2001) ("Beaumont II"); Beaumont v. FEC, 137 F.Supp.2d 648 (E.D.N.C. 2000) ("Beaumont I"). Accordingly, they found 2 U.S.C. Section 441b(a) unconstitutional as applied, relying upon this Court's ruling in MCFL, but refused to find 2 U.S.C. Section 441b(a) unconstitutional on its face, relying on numerous free speech and association opinions of this Court. *See* Beaumont III, 278 F.3d at 266, 267; Beaumont I, 137 F.Supp.2d at 651, 652, 655, 656.

Had the courts below measured the constitutionality of 2 U.S.C. Section 441b(a) and accompanying regulations by the First Amendment guarantee of the freedom of the **press**, they should have found in addition that Section 441b(a) and related regulations are invalid, having imposed upon North Carolina Right to Life ("NCRL") an unconstitutional prior restraint and discriminatory burden, and exercised editorial control over NCRL's core press activities, as part of an administratively flawed and constitutionally impermissible FEC-administered licensing scheme.

A. The Distinction Between Direct Campaign Contributions and Independent Expenditures is Flawed.

According to the Government, the issue before this Court requires it to make a constitutional distinction between direct campaign contributions and independent expenditures in connection with a federal election, permitting some nonprofit corporations to make expenditures, but forbidding the same nonprofit corporations from making contributions. *See* Pet. Br. at 15-16, 18, 21-23. With respect to expenditures, the

Government has conceded that it must show a compelling state interest to justify a regulatory policy. *Id.* at 16. With respect to contributions, however, the Government insists that it need only show a "less compelling" (presumably substantial) interest to justify a regulation. *Id.*, at 28. The Government's attempt to draw a Maginot line between contributions and independent expenditures, and thus justify one rule governing expenditures and another governing contributions, however, is seriously flawed.

Since Buckley v. Valeo, it has become common parlance to make the campaign expenditure/contribution divide. A closer look at FEC regulations, however, reveals that there is a third category of campaign finance spending — expenditures which are neither "campaign contributions" in that no cash or in-kind contribution is given to any campaign, nor "independent expenditures." These "non-independent expenditures" are generally treated as prohibited contributions by the FEC. At the same time, many non-independent expenditures (usually those made by for-profit corporations) have been determined to be lawful by the FEC, giving rise to serious question as to the rationality of the regulatory scheme and the vitality of the two distinct constitutional tests applied in campaign finance reform cases. This point is especially significant when examined in relation to the FEC rules governing contributions and expenditures by corporations, both profit and nonprofit.

To decide in this case whether a nonprofit advocacy corporation, such as NCRL, has the right under the First Amendment to make contributions to federal candidates, it is necessary to understand the nature of the statutory "prohibition" on corporate contributions and all of its exceptions. The court of appeals below rightfully observed that FECA "Section 441b(a) makes it 'unlawful ... for any corporation whatever ... to make a contribution or expenditure in connection with any

election' for federal office." Beaumont III, 278 F.3d at 264. This prohibition, while absolute on its face, does not mean that **all** corporations are barred from making **any** contribution or expenditure. Most definitely, this statute does not prohibit **all** corporate expenditures on behalf of candidates for federal office; and, notwithstanding the FEC's contention that "federal law has prohibited corporate contributions to candidates for federal offices since 1907" (Pet. Br. at 12), federal law does not prohibit absolutely **all** corporate contributions to such candidates. There are numerous exceptions.

1. Permissible Corporate Expenditures

(a) As the court of appeals acknowledged, 11 C.F.R. § 114.10 provides for an exemption for "independent expenditures" in support of a federal candidacy made by certain corporations that meet the qualifications laid down by this Court in MCFL. Beaumont III, 278 F.3d at 265.

(b) Corporations may endorse and communicate their endorsement of a candidate to corporate executives, stockholders and their families, coupled with a public announcement of such endorsement by means of a press release or press conference so long as the disbursements incurred in connection with such release or conference are *de minimis*. 11 C.F.R. § 114.4(c)(6)(i).

2. Permissible Corporate Contributions

(a) A corporation may provide free legal and accounting services for the purpose of enabling a candidate's campaign committee to comply with the FECA. 11 C.F.R. §

100.7(b)(14).[5] This regulation allows a corporation to make, in effect, in-kind contributions to federal candidates worth tens of thousands of dollars for necessary services which otherwise would have to be paid for by campaign funds.

(b) Corporations may make available to a candidate use of a corporate airplane at the first class rate (payment to be made in advance) (i) if the destination city is served by commercial air service (otherwise the candidate must pay the usual charter rate), and (ii) if the corporation is not licensed to provide commercial air services 11 C.F.R. § 114.9(e)(1). The first class rate is known to represent only a fraction of the true cost of the in-kind contribution being made by the corporation.

(c) Corporations in the business of selling food and beverages may sell food and beverages for use by a candidate's campaign committee at a charge less than the commercial rate, so long as the charge is at least equal to the costs of such food or beverage to the vendor and so long as the aggregate value of such discount (in-kind contribution) does not exceed $1,000 per individual candidate per election. 11 C.F.R. § 114.1(a)(2)(v).

(d) Corporations may provide incidental use of corporate facilities for volunteer campaign work up to one hour per week and four hours per month. 11 C.F.R. § 114.9(a)(1).

(e) Incorporated banks and other financial institutions may make loans in unlimited amounts to federal campaigns without

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[5] The corporation must be the regular employer of the individual performing the service. 11 C.F.R. § 100.7(b)(14). The corporation may not hire additional employees to free regular employees to perform the services. 11 C.F.R. § 114.1(a)(2)(vii). The corporate employee providing the service may use the corporation's resources, such as computer equipment. Advisory Opinions ("AO") 1989-13 and 1980-137.

those loans being considered contributions, as the receipt of loans are otherwise considered.[6] (11 C.F.R. § 100.7(b)(11).)

(f) There is no prohibition in law or in practice which prohibits civil monetary penalties assessed by the FEC against a political committee (even a candidate's campaign committee) for FECA violations to be paid by a corporation. *See, e.g.*, FEC Advisory Opinion ("AO") No. 1980-135.

3. Permissible Corporate Mixed Expenditures-Contributions

At least seven types of permissible corporate expenditures which need not be "independent" from federal election campaigns, and can be "coordinated" with the campaigns, making them in effect in-kind contributions, exist and are found in the FEC regulations. (With respect to MCFL-type corporations, expenditures must be independent, and any coordinated expenditures are classified as prohibited contributions. 11 C.F.R. § 114.10(d)(2) and 11 C.F.R. § 109.2.)

(a) Corporations may expressly advocate the election or defeat of a candidate for federal office so long as such express advocacy is directed only to corporate executives, stockholders and their families. 11 C.F.R. §§ 114.3(a)(1) and 109.1. There is no requirement that such expenditures be independent from

[6] For an individual who is in the business of lending money (*e.g.*, an individual who makes postage loans to the clients of direct mail agencies), any loan to a candidate's committee would be limited to $1,000 per election. 11 C.F.R. § 110.1(b). This combination of FEC rules results in the peculiar circumstance where corporations have greater rights to make loans (contributions) to federal campaigns than individuals.

federal candidates, and, indeed, such express advocacy may be coordinated with the candidate.

(b) As neither court below acknowledged, FECA contains a blanket exemption with respect to any corporation that owns "any broadcasting station, newspaper, magazine, or other periodical publication" for any expenditure for "any news story, commentary, or editorial [when] distributed through the facilities" of the station, newspaper, magazine or other periodical publication owned by such corporation (or other), "unless such facilities are owned or controlled by any political party, political committee, or candidate." *See* 2 U.S.C. Section 431(9)(B)(i). Although this "media exemption" is expressed in terms of expenditures, since there are no prohibitions on coordination with federal candidates (so long as there is no ownership or control), the media expenditures need not be independent from the campaign, taking on the nature of contributions.

(c) A corporate broadcaster, *bona fide* newspaper, magazine or other periodical, or qualified nonprofit corporation (*i.e.*, a 26 U.S.C. Section 501(c)(3) or (c)(4) organization) may sponsor a candidate debate in accordance with 11 C.F.R. §§ 110.13 and 114.4(f) to which not all candidates for the office need be invited. 11 C.F.R. §§ 110.13 and 114.4(f). Additionally, any corporation may donate funds to a qualified nonprofit organization to stage such debates. 11 C.F.R. § 114.4(f)(3). Since a candidate's debate is coordinated with the included candidates (often to the exclusion of minor party candidates), this type of expenditure can take on the nature of a contribution to two or more major party candidates.

(d) Any incorporated nonprofit educational institution exempt under 26 U.S.C. Section 501(c)(3) may sponsor, at no charge or at less than the usual and normal charge, appearances

by candidates or candidate representatives open to the academic community or general public, if the sponsoring institution (i) makes reasonable efforts to ensure that the appearances constitute speeches, question-and-answer sessions or similar communications, (ii) does not, in conjunction with the appearance, expressly advocate the election or defeat of any candidate, and (iii) does not favor any candidate over another in allowing such appearances. 11 C.F.R. § 114.4(c)(7).

(e) Corporations may sponsor election-related appearances by a candidate before company employees at a meeting, convention or other function (i) so long as the company does not expressly advocate the election of the candidate or defeat of his or her opponent(s), and (ii) so long as the company does not solicit contributions on behalf of the candidate, even though the candidate may solicit contributions at such events. 11 C.F.R. §§ 114.4(b)(1) and 114.4(b)(1)(iv).

(f) Corporations may make available to a candidate corporate meeting rooms for free, or at a discount, if the corporation: (i) customarily makes its meeting rooms available to clubs, civic or community organizations, or other groups; (ii) makes the rooms available to other candidates upon request; and (iii) makes the rooms available to the candidates on the same terms given to other groups. 11 C.F.R. § 114.13.

(g) Corporations may sponsor an appearance, which may be open to the general public, of an incumbent federal officeholder in his or her official capacity so long as the appearance is limited to issues of concern to the sponsoring corporation, provided that the officeholder make no solicitation at such event. FEC AO 1996-11.

4. Permissible Contributions and Expenditures by Corporate SSFs

As the FEC admitted to both the district court and the court of appeals, the "FECA and its implementing regulations ... allow[] all corporations to make campaign contributions through a separated segregated fund, and corporations that do not fall within *11 C.F.R. § 114.10's* exception to make independent expenditures through such a fund." Beaumont III, 278 F.3d at 269. Such separated segregated funds ("SSFs") may be supported from the general corporate treasury to cover operating costs, such as office space, telephones, salaries, supplies, legal and accounting fees, and fundraising activities without any dollar limit and without any required reporting to the FEC. 11 C.F.R. § 114.1(b). With the SSF's operating and fundraising expenses completely paid by the corporation, every single dollar contributed to the SSF may be used for either contributions or expenditures to affect federal elections.

5. Incorporated Political Committees

Lastly, it is a curious fact that innumerable corporations regularly make contributions to federal candidates (as well as expenditures relating to federal candidates) with the blessing of the FEC. The reason is that political committees of all types may, themselves, be incorporated. 11 C.F.R. § 114.12(a). Despite the FEC's citation to authorities which focus on the "special characteristics of the corporate structure" and the "special advantages that the State confers on the corporate form" as justifying prohibitions on direct contributions to federal elections (Pet. Br. at 14), the FEC apparently has the ability to look beyond corporate form to substance when it justifies its own policy choices.

B. 2 U.S.C. Section 441b(a) Constitutes an Integral Component of a Comprehensive Licensing System Governing Core Political Speech.

In order to administer these numerous exceptions permitting corporate participation (as well as other limitations and exceptions to participation) in core political speech connected to federal election campaigns, Congress established the FEC. The FEC is composed of six members "appointed by the President, by and with the consent of the Senate[,] no more than three members [of which] may be affiliated with the same political party." 2 U.S.C. Section 437c(a)(1). As this Court found in Buckley, Congress has conferred upon the FEC "significant" powers:

> (1) "Recordkeeping, disclosure and investigative functions," having made the Commission "the principal repository of the numerous reports and statements which are required ... to be filed by those engaging in the regulated political activities." Such duties include the "filing and indexing" of the required reports and statements, "making them available for public inspection, preservation, and auditing and field investigations," and thus, "serv[ing] as a national clearinghouse for information in respect to the administration of elections" [*Id.*, 424 U.S. at 109-10];
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> (2) "[E]xtensive rulemaking and adjudicative powers," having granted to the Commission authority to "formulate general policy with resepct to the administration of [the] Act," with "primary jurisdiction with respect to [the] civil enforcement" of the Act coupled with authority to issue "advisory opinions" [*Id.*, 424 U.S. at 110]; and
>
> (3) "Direct and wide-ranging enforcement powers," having conferred upon the Commission authority to conduct "administrative determinations and hearings, and civil suits for "injunctive relief" in order to ensure compliance with the statute and rules. [*Id.*, 424 U.S. at 111, 137.]

Armed with such powers, the FEC functions as a federal government licensing commission, permission from which is virtually required before any corporation (other than an institutional media corporation) may have reasonable assurance that it may lawfully engage in core political speech in connection with a federal election campaign. Such licensing power extends even to the administration of entities and activities that are exempted from FEC control in that the FEC has the power to determine, in the first instance, whether any entity or its activity falls within such an exception.

In other words, the FEC statutory rules are not self-executing; nor, with respect to these rules, are the interpretive or constitutional rulings of this Court. For example, when this Court handed down its decision in the MCFL case, MCFL-qualified corporations were not automatically identified, and thus entitled to their constitutional rights. Rather, under the three-part test[7] of MCFL, all nonprofit advocacy corporations remained under the jurisdiction of the FEC. Thus, they remained subject to significant FEC discretionary power.

In the hands of a government agency determined to minimize the adverse effect of its loss in court, this Court's three-part test has become a powerful tool to frustrate MCFL-type corporations in their ability to engage in independent expenditures. The FEC-articulated requirements have become so precise, stringent, and technical that it has been frequently remarked that even MCFL would be fortunate to qualify as an

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[7] "*First*, it was **formed for the express purpose of promoting political ideas**, and cannot engage in business activities.... *Second*, it has **no shareholders** or other persons affiliated so as to have a claim on its assets or earnings.... *Third*, MCFL was **not established by a business corporation or a labor union**, and it is its **policy not to accept contributions from such entities**." [479 U.S. at 264 (emphasis added).]

MCFL-type organization under the FEC's rules. For example, the Court's second test that the nonprofit corporation has no shareholders was expanded into 11 C.F.R. § 114.10(c)(3)(ii).[8]

FEC regulations require that a nonprofit corporation jump through more hoops than constructed by this Court to be entitled to make independent expenditures. As illustrated by this case, the FEC has enormous discretion in applying the

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[8] The FEC did little to advise the political committees it licenses as to the new rules. The FEC's "Campaign Guide for Corporations and Labor Organizations," relied on by political committees as a statement of the requirements in simpler terms than the law and regulations, did not include any indication of the 1986 change in the law until it was revised in 1992 and then it described the ruling as one which only involved "a small, nonprofit corporation." "Campaign Guide for Corporations and Labor Organizations," March 1992, p. 21.

The MCFL decision was issued December 15, 1986. The FEC's initial MCFL rulemaking was initiated not by the FEC, but by a political organization which filed a rulemaking petition, published in the *Federal Register*, 52 Fed. Reg. 16,275 (May 4, 1987). It was not until January 7, 1988 that the FEC issued an Advance Notice of Proposed Rulemaking, 53 Fed. Reg. 416 (Jan. 7, 1988). It was not until October 13, 1988 that the FEC scheduled a hearing, for November 16, 1988. 53 Fed. Reg. 40,070 (Oct. 13, 1988). On October 3, 1990, the FEC requested further comments in view of this Court's decision in Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). 55 Fed. Reg. 40,397 (Oct. 3, 1990). On October 31, 1990, the FEC extended the comment period relating to Austin. 55 Fed. Reg. 45,809 (Oct. 31, 1990). Then, on July 29, 1992, the FEC finally issued a Notice of Proposed Rulemaking implementing MCFL, seeking comments due in September and a hearing in October. 57 Fed. Reg. 33,548 (July 29, 1992).

It was not until July 6, 1995, that the FEC issued Final Regulations implementing MCFL. 60 Fed. Reg. 35,292 (July 6, 1995). These rules were revised December 14, 1995, 60 Fed. Reg. 64,260 (Dec. 15, 1995), and these were not made effective until March 13, 1996, exactly **nine months shy of a decade** subsequent to this Court's decision in MCFL. 61 Fed. Reg. 10,269 (Mar. 13, 1996).

three-factor formula determining whether a nonprofit advocacy corporation, such as NCRL, is qualified for an exemption from the 2 U.S.C. Section 441b(a) prohibition against corporate expenditures in connection with a federal election campaign. Even after the court of appeals below had found that NCRL qualified for the MCFL exemption, the FEC "has not foresworn its ultimate intention to prohibit NCRL ... from making independent expenditures." Beaumont III, 278 F.3d at 269, n. 3.

The FEC's treatment of NCRL appears to reflect the FEC's general policy with respect to any nonprofit advocacy corporation which claims the MCFL exemption. That claim is subject to prior FEC review every election cycle. At a pretrial hearing in McConnell, *et al.* v. FEC, *et al.*, Docket No. 02-CV-581 (U.S.D.C.-D.C.), in support of the FEC's position that extensive discovery might be required into the membership and finances of several MCFL-type advocacy organization plaintiffs, an FEC assistant general counsel revealed how intrusive the FEC information demands and requirements are for such an organization to meet the MFCL qualifications:

> I'd like to remind this court that in FEC versus NRA this circuit specifically said that it's the burden of the Federal Election Commission to take a look at the purpose of the members for joining and the nature of the income of these organizations
>
> I'm not going to be satisfied to have counsel tell me, well, we only received a thousand dollars worth of corporate activity -- corporate income. I want to take a look at the books myself.
>
> I'm not going to be satisfied with looking at their charter to determine whether, you know, what members believe when they joined.

And, in fact, I believe the court specifically says that it is our burden to take a look at those studies and develop that kind of record....

This circuit, unlike some of the other circuits, have [*sic*] said we have to take a look at the absolute amount of activity, corporate activity, not a mere percentage. [Transcript of April 23, 2002, Scheduling Conference, before the three-judge United States District Court in McConnell, *et al.* v. FEC, *et al.*, Docket No. 02-CV-581 (U.S.D.C.-D.C.) at 66-68.]

Thus, a nonprofit corporation like NCRL claims the MCFL exemption at its peril, unless, prior to, or at the outset of, each election cycle it obtains from the FEC an Advisory Opinion ("AO") affirming that it qualifies as an MCFL-type corporation. *See* 2 U.S.C. Section 437f. Under current FEC procedures, however, there is no guarantee that such an organization, even if it seeks an AO, will obtain such an opinion, because such opinions require the affirmative vote of four FEC members. *See* 11 C.F.R. § 112.4(a). If no AO is forthcoming, or if it is adverse, the nonprofit advocacy organization must either forego making federal election-related expenditures and contributions, or, comply with the FECA's onerous SSF rules, or file a law suit claiming violation of its constitutional rights.

C. As an Integral Component of a Comprehensive Licensing System Governing Core Political Speech, 2 U.S.C. Section 441b(a) Operates as an Unconstitutional Prior Restraint and Discriminatory Burden in Violation of the Freedom of the Press.

As noted by the court of appeals below, the FEC has insisted that 2 U.S.C. Section 441b(a) does not operate as a "blanket prohibition" upon NCRL's desire to make contributions to, and

independent expenditures on behalf of, federal election candidates. It may do both, but it must do so by means of an SSF created and operated in accordance and compliance with 2 U.S.C. Section 441b(a) and (b)(2)(C) and FEC regulations. Beaumont III, 278 F.3d at 269. As also noted by the court of appeals below, however, "organizations that use a segregated fund must adhere to significant reporting requirements, staffing obligations, and other administrative burdens [that] stretch far beyond the more straightforward disclosure requirements on unincorporated associations." *Id.* Relying on the majority and concurring opinions of this Court in MCFL, the court of appeals below concluded that such burdens were so "severely demanding" that there was no doubt that they infringed upon "the exercise of political speech and association," thereby triggering its inquiry into whether "2 U.S.C. § 441b(a) and the associated regulations [limiting expenditures are] narrowly tailored to serve a compelling governmental interest," and whether that statute and associated regulations limiting contributions are "closely drawn to match a sufficiently important governmental interest." Beaumont III, 278 F.3d at 271. While such constitutional tests may be germane to a claim that the statute and regulations in question abridge the freedoms of speech and association, they are not determinative in this case because 2 U.S.C. Section 441b(a) and associated regulations not only "burden" free speech and association, but also operate as a "prior restraint" and "discriminatory burden" upon NCRL's press activities.

A nonprofit advocacy corporation does not automatically qualify as exempt from Section 441b(a)'s prohibition against corporate expenditures in connection with a federal election campaign. According to 11 C.F.R. §§ 114.10(a) and 114.10(e)(1), such a corporation must "demonstrat[e] qualified nonprofit corporation status" by "certify[ing] [to the FEC] ... that it is eligible for an exemption from the prohibitions against

corporate expenditures."[9] Therefore, according to 11 C.F.R. § 114.10, a nonprofit advocacy corporation may qualify as exempt from Section 441b(a)'s prohibition against corporate expenditures in connection with a federal election **only** if its registration as an MCFL-qualified corporation is approved by the FEC.

As the court of appeals pointed out, the exemption contained in 11 C.F.R. § 114.10 "was created in response to the Supreme Court's decision that Section 441b(a)'s prohibition on independent expenditures from a corporation's general treasury was unconstitutional as applied to ... MCFL" and tailored to the three-factor formula laid down in that case. Beaumont III, 278 F.3d at 265. As currently structured, however, 11 C.F.R. § 114.10 imposes a *de facto* licensing system, requiring nonprofit advocacy corporations to certify to the FEC that they are not covered by the expenditure prohibition contained in 2 U.S.C. Section 441b(a). By placing "the initial burden" on the nonprofit, 11 C.F.R. § 114.10 operates as an administrative censorship system without any of the prompt review and judicial safeguards required of such a system, and thus, constitutes an unconstitutional prior restraint. *Cf.* Freedman v. Maryland, 380 U.S. 51, 60 (1967).[10]

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[9] While it may make such expenditures before filing FEC Form 5, or a letter containing the information required by the form, it must meet various regulatory deadlines and informational requirements as stated in 11 C.F.R. § 114.10(e)(1)(i)-(ii) and (2). Among the informational requirements are data designed to enable the FEC to determine whether such expenditures are truly independent, or whether they might be classified as coordinated expenditures, and, thus forbidden contributions. 11 C.F.R. § 114.10(e)(2) and 11 C.F.R. § 109.2.

[10] A nonprofit corporation may seek from the FEC an AO determination that it is qualified before it makes any expenditures in connection with a federal election, but neither the statute nor the regulations assure the corporation an administrative decision on the merits, much less a prompt judicial determination. *See* 11 C.F.R. § 112.4(a).

In contrast with its administration of the MCFL exception, the FEC does not require a broadcasting facility, newspaper, magazine or other periodical to register with the FEC, certifying that it is not owned by a political party, political committee, or candidate, and thus is exempt under 2 U.S.C. Section 431(9)(B)(i). Nor is any broadcasting facility, newpaper, magazine of other periodical required to file reports with the FEC, accounting for its expenditures, even for the limited purpose of enabling the FEC to determine if such expenditures had been made in coordination with a federal election campaign. To the contrary, FEC enforcement of the media exemption has been severely curtailed by two district courts in deference to freedom of the press. *See* Reader's Digest Ass'n. Inc. v. FEC, 509 F.Supp. 1210 (S.D.N.Y. 1981); FEC v. Phillips Publishing, Inc., 517 F.Supp. 1308 (D.D.C. 1981).

The media exemption provided for in 2 U.S.C. Section 431(9)(B)(i) does not extend to "contributions," but it does appear that the expenditure exemption means that media exempt under that section could make contributions in the form of coordinated expenditures, so long as they are made in connection with a news story, commentary or editorial. Such is not the case with respect to the MCFL exception, so there is every reason to believe that the FEC will continue its supervisory oversight of MCFL-qualified corporations with respect to both expenditures and contributions, even if the opinion of the court of appeals is affirmed by this Court.

According to the FEC's position, however, the prior restraints placed upon an MCFL-qualified corporation are not sufficient with respect to contributions, and the enforcement of its contribution limits upon corporations call for the more stringent policing standards provided for SSFs in 2 U.S.C. Section

441b(b). Such an alternative only exacerbates the prior restraint violation. According to 2 U.S.C. Section 431(4)(B), an SSF is a "political committee" which, in turn, is required to register with the FEC within 10 days of its establishment. *See* 2 U.S.C. Section 433(a) and 11 C.F.R. § 102.1(c). To register, the treasurer of an SSF must prepare and file an initial FEC Form 1 with the FEC, providing the name and address of the SSF, the name and address of the connected organization, the type of connected organization, the name and address of the custodian of its records, the name and address of the treasurer, and the names and mailing addresses of banks or other depositories with which the SSF does business. 11 C.F.R. §§ 102.2 and 105.4. After FEC Form 1 has been filed, the FEC assigns an identification number to the SSF. 11 C.F.R. § 102.2(c). Failure to file Form 1, alone, subjects the nonprofit corporation to the FEC enforcement powers, including the authority to seek injunctive relief from a federal court.

It has long been the rule that the freedom of the press prohibits even a court from issuing an order restraining the publication of core political speech, which this Court has described as "of the essence of censorship." Near v. Minnesota, 283 U.S. 697, 713 (1931). Such a system of prior restraints may be justified, if at all, only by proof of an imminent threat of the highest order, such as that the "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" in wartime. New York Times v. United States, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring).

Nonprofit advocacy corporations such as NCRL engage in a variety of press activities. They publish news, editorials, and commentaries, to communicate to the public, often in competition with other press sources, including the institutional and commercial media such as newspapers, magazines, radio,

and television. In order to engage in the political marketplace of ideas, however, any press activities of NCRL would be burdened by the prior restraints of the FEC's certification, registration, reporting, and record-keeping requirements, whereas the ordinary publishing activities of the institutional and commercial media are totally exempted, and protected from any comparable restraints. *See* 2 U.S.C. Section 431(9)(B)(i); FEC v. Phillips Publishing Inc., *supra,* 517 F. Supp. at 1312-13. *See also* Hasen, "Campaign Finance Laws and the Rupert Murdoch Problem," 77 *Tex. L. Rev.* 1627, 1632-34 (1999).

If Congress were to repeal the FECA's institutional media exemption, and place the news reporting, editorial writing, and commentaries of such media under the supervisory jurisdiction of the FEC — requiring such institutions as *The Charlotte Observer* or *The Greensboro News & Record* to certify, register, report, keep records, and abide by specified limits on their expenditures in order to prevent corruption and the appearance of corruption, before they can publish anything that might influence the outcome of a federal election — there is little doubt that such corporate media outlets would institute a lawsuit challenging the constitutionality of such federal regulation as a violation of the freedom of the press. But the freedom of the press was never designed as a special institutional privilege, nor has the U.S. Supreme Court ever so limited that freedom.[11]

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[11] The suggestion that the freedom of the press was a special institutional privilege prompted Chief Justice Burger to write, in his concurring opinion in First National Bank of Boston v. Bellotti, 435 U.S. 765, 801 (1978), that the "very task of including some entities within the 'institutional press' while excluding others [is] reminiscent of the abhorred licensing system [that] the First Amendment was intended to ban."

In attempting to justify the so-called prohibition on corporate contributions to candidates in federal elections, the FEC has pointed to statements in certain of this Court's opinions, beginning at least with the decision in Buckley v. Valeo, noting that the treatment given certain corporations under the campaign finance system is designed to prevent "corruption and the appearance of corruption." Pet. Br. at 13-14. Such treatment saddles for-profit and nonprofit corporations with the tinge of potential corruption irrespective of any facts or events. As pointed out by the court of appeals, there would appear to be no danger of corruption, actual or apparent, with respect to contributions from corporations such as NCRL. Beaumont III, 278 F.3d at 273-274.

The FEC assumes that there is no need to settle on a definition of "corruption," on the theory that this Court's prior decisions have already justified the ban against corporate contributions in federal elections on a presumption of "corruption." *See, e.g.*, Pet. Br. at 13-14, 18. Nevertheless, defining "corruption" should be a key issue in determining the constitutionality of such campaign finance reform legislation. *See* Nixon v. Shrink Missouri Gov't. PAC, 528 U.S. 377, 424 (2000) ("Shrink PAC") (Thomas, J., dissenting). Although Justice Thomas's view was not joined by the majority in Shrink PAC, the majority read Buckley v. Valeo to have adopted a more amorphous definition of "corruption," noting that no party in Shrink PAC had "challenged the legitimacy of the ... objectives" of campaign reform as articulated in Buckley, nor called "for any reconsideration of Buckley." Shrink PAC, 528 U.S. at 390. Neither Buckley, nor any of its progeny, has examined the sufficiency of the claim of corruption or appearance of corruption under the press principle of no prior restraint. If the general claim of "national security" is not sufficient to justify such a restraint (*see* New York Times v.

United States, 403 U.S. at 718), then neither is a generalized appeal to corruption or the appearance of corruption.

D. As an Integral Component of a Comprehensive Licensing System Governing Core Political Speech, 2 U.S.C. Section 441b(a) Grants to the FEC Editorial Control in Violation of the Freedom of the Press.

Nonprofit advocacy corporations that qualify under the MCFL rule to make independent expenditures in connection with a federal election campaign are required by FEC regulations to submit to significant FEC editorial control of their press activities undertaken in relation to such campaigns. If the MCFL rule is extended to contributions made by MCFL-qualified nonprofit advocacy corporations to candidates running for federal office, the FEC rules governing such contributions impose significant editorial control over such corporations. If the MCFL rule is not extended to contributions, then the FEC will exercise significant editorial control over MCFL-qualified corporations via its rules and regulations governing SSFs. In either event, such editorial controls constitute unconstitutional abridgments of NCRL's freedom of the press.

According to 11 C.F.R. § 114.10(e)(2), an MCFL-qualified nonprofit advocacy corporation must comply with the expenditure reporting requirements of 11 C.F.R. § 109.2. 11 C.F.R. § 109.2, in turn, requires periodic reports to the FEC of "all independent expenditures aggregating in excess of $250 during a calendar year." 11 C.F.R. § 109.2(a). Such reports must contain the following information: (1) the reporting person's name, address, occupation, and employer; (2) the identification of the person to whom the expenditure was made; (3) the date, amount and purpose of the expenditure; (4) a statement whether the expenditure was made in support of, or in opposition to a candidate, together with the candidate's name

and office sought; (5) a notarized certification under penalty of perjury as to whether such expenditure was made in cooperation, consultation, or concert with, or at the request or suggestion of any candidate or any authorized committee or agent thereof; and (6) the identification of any person who contributed more than $200 to the person filing the report if the contribution was made for the purpose of furthering the reported expenditure. 11 C.F.R. § 109.2(a)(1)(i)-(vi).

Additionally, an MCFL-qualified nonprofit advocacy corporation is required by 11 C.F.R. § 114.10(g) to comply with the disclaimer requirements of 11 C.F.R. § 110.11. Accordingly, if an MCFL-qualified nonprofit corporation expends money for "a communication that expressly advocates the election or defeat of a clearly identified candidate, or solicits a contribution" by means of certain specified public media, the communication or solicitation must "present... in a clear and conspicuous manner ... giv[ing] the reader, observer or listener adequate notice of the identity of persons who paid for and, where required, who authorized the communication," as well as a disclaimer that such communication or solicitation has not been authorized by a candidate or the candidate's committee. 11 C.F.R. § 110.11(a)(1)(iii). If, however, the communication or solicitation appears in any media specified in 11 C.F.R. § 110.11(a)(6), then the disclosure and disclaimer rules of 11 C.F.R. § 110(a)(1) do not apply.

Finally, an MCFL-qualified nonprofit advocacy corporation is required by 11 C.F.R. § 114.10(f) to "inform potential donors that their donations may be used for political purposes, such as supporting or opposing candidates" in all communications that solicit donations to support the advocacy corporation.

There is no question that these regulations, as applied to the expenditures of an MCFL-qualified corporation, transfer

editorial control over its communications and solicitations from the corporation to the FEC. According to 11 C.F.R. § 114.10(g), the corporation must include certain disclosures and disclaimers in its communications advocating the election or defeat of a candidate for federal office. Such an intrusion upon the corporation's editorial function is *per se* a violation of the freedom of the press. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 247-54, 256, 258 (1974)("[T]he court has expressed sensitivity as to whether a restriction or requirement constituted a compulsion exerted by government of a newspaper to print.... The clear implication has been that any such compulsion to publish that which 'reason tells them should not be published' is unconstitutional.") This salutary rule has been extended by this Court to solicitations for money by **all** nonprofit advocacy corporations. Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 797 (1988).[12] After all, the freedom of the press is not a special institutional press privilege, but a freedom enjoyed by all. *See* Lovell v. Griffin, 303 U.S. 444, 450, 452 (1938).

Additionally, compliance with the reporting requirements, as provided for in 11 C.F.R. § 114.10 (e)(1) and (2), imposes a financial burden upon MCFL-qualified corporations that, likewise, infringes upon the editorial function of such corporations. As this Court ruled in Miami Herald v. Tornillo, freedom of the press is predicated not only upon the right of the publisher to decide what to publish and what not to publish, but also upon the financial freedom to make such decisions unburdened by government-imposed costs. *Id.*, 418 U.S. at 255-58. In the Miami Herald case, a Florida right-to-reply

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[12] The court in FEC v. Phillips Publishing, Inc., *supra*, observed that "newsletters and other publications solicit[ing] subscriptions, and in their advertising doing so, ... publicize content and editorial positions." *Id.*, 517 F.Supp. at 1313.

statute was struck down, in part, because the law exact[ed] a penalty in the form of increased costs in the printing of the newspaper. Certainly the costs of complying with the reporting requirements contained in 11 C.F.R. § 109.2, imposed upon an MCFL nonprofit advocacy corporation when it makes expenditures in connection with a federal election campaign, is no different from the costs that would have been incurred by the *Miami Herald* if it had been forced to publish the reply of a candidate running for public office as required by the Florida statute struck down in that case.

These unconstitutional impositions upon an MCFL-qualified corporation's editorial function are multiplied by the disclosure requirements of 11 C.F.R. § 110.11(a)(1), which force such corporations to reveal the publisher of any communication that expressly advocates the election or defeat of a candidate for election to federal office. As Justice Black cogently observed in Talley v. California, 362 U.S. 60 (1960), "the obnoxious press licensing law of England, which was also enforced in the Colonies was due in part to the knowledge of the exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government." *Id.*, 362 at 64. *Accord*, McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (Thomas, J., concurring).

Should the MCFL exception to the prohibition against corporate expenditures be extended to contributions, as the court of appeals concluded below, the FEC administration of that exception would, nonetheless, violate NCRL's right of editorial control guaranteed by the freedom of the press. As the court of appeals found, and as this Court has consistently held since Buckley v. Valeo, contributions to another's election campaign constitutes core political speech. Beaumont III, 278 F.3d at 267-68. Additionally, as the court of appeals noted and as this Court recognized in MCFL, the decision to contribute

money to another's election campaign is a discretionary one based, in part, upon an individual "regard [that] such a contribution [is] a more effective means of advocacy than spending the money under their own personal direction." *Id.*, 278 F.3d at 268. While this observation has been made in relation to the courts' recognition that campaign contributions are a form of free speech and free association, it is equally applicable to a recognition that the decision to make a contribution to another's political campaign is an editorial one, designed to "enhance[] the donee's ability to comunicate a message," and perhaps in the process, "to put the funds to more productive use than can the individual" donor. Colorado Rep. Fed. Campaign Comm. v. FEC, 518 U.S. 604, 636 (1996) (Thomas, J., concurring in judgment and dissenting in part).

As an exercise of the editorial function, contributions, like expenditures, may not be burdened in such a way as to wrest editorial control from the person, including a corporation. As this Court held in Miami Herald, a corporation may not be financially burdened to accommodate a government policy that directly impacts upon that corporation's exercise of editorial judgment. *Id.*, 418 U.S. at 255-58. The court of appeals below found that if a nonprofit advocacy corporation were required to create an SSF in order make contributions to a candidate's federal election campaign, it would be saddled with "significant reporting requirements, staffing obligations, and other administrative burdens ... stretch[ing] far beyond the more straightforward disclosure requirements on unincorporated associations." Beaumont III, 278 F.3d at 269. Indeed, after cataloguing the extent of such reporting and organizational burdens, the court of appeals concluded that "[f]aced with the need to assume a more sophisticated organizational form, to adopt specific accounting procedures, to file periodic detailed reports, and to monitor garage sales lest nonmembers take a fancy to merchandise on display, it would be surprising if at

least some groups decided that the contemplated political activity was simply not worth it." *Id.*, 278 F.3d at 270.

In Miami Herald, this Court found that the "economic reality" of operating a newspaper similarly does not allow for the assumption that "a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available." *Id.*, 418 U.S. at 257. To permit the government to lay such an economic burden upon the exercise of a person's editorial judgment is tantamount to a penalty in the form of increased costs that is impermissible under the free press guarantee. *See id.*, 418 U.S. at 255-58.

Should this Court affirm the court of appeals, extending the MCFL rule to contributions, NCRL will probably still be subject to burdensome registration, reporting and even editorial requirements. As noted in Section II.B. above, following the MCFL decision, the FEC implemented regulations requiring a corporation that seeks MCFL protection to demonstrate by certification that it is a qualified nonprofit under the MCFL three-factor test and to file certain reports and abide by certain regulations governing its communications and solicitations. *See* 11 C.F.R. § 114.10. In any event, NCRL will be subject to the current individual contribution limitations imposed by 2 U.S.C. Section 441a which directly and adversely impact upon NCRL's editorial function to decide how to spend money in support of, or in opposition to, an individual election campaign in violation of the freedom of the press rule in Miami Herald.

CONCLUSION

For the foregoing reasons, the decision of the U.S. Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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In the

Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971, 2 U.S.C. § 441b, prohibits corporations and labor unions from making direct campaign contributions and independent expenditures in connection with federal elections. The question presented is whether Section 441b's prohibition on contributions violates the First Amendment to the Constitution if it is applied to a nonprofit corporation whose primary purpose is to engage in political advocacy.

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Miscellaneous

Baker, C. Edwin, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57 16

Bauer, Robert F., *Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives*, 51 Cath. U.L. Rev. 741 (2002) 10-11

Ben and Jerry's Social Performance Audit 2001, (http://www.benjerry.com/socialmission/01socialaudit/letter01.html) (visited Jan. 30, 2003) 18

BeVier, Lillian R., *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 Colum. L. Rev. 1258 (1994) 18-19

BeVier, Lillian R., *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, Cato Policy Analysis No. 282 (Sept. 4, 1997) 14

Butler, Henry N. & Ribstein, Larry E., *The Corporation and the Constitution* (AEI 1995) 23

TABLE OF AUTHORITIES—Continued

Page

Center for Responsive Politics, *Election Overview, 2002 Cycle, Top Individual Contributors* (http://www.opensecrets.org/overview/topindivs.asp?cycle=2002) (visited Jan. 24, 2003) 18

Center for Responsive Politics, *Election Overview, 2002 Cycle, Top Overall Donors* (http://www.opensecrets.org/overview/topcontribs.asp?cycle=2002) (visited Jan. 24, 2003) .. 18

CNN, *Environmental Campaigners Take Aim at Oil Companies* (May 30, 2002) (http://www.cnn.com/2002/WORLD/europe-/05/30/oil.environment.groups.glb/index.html) (visited Jan. 29, 2003) 20

Consolidated Edison website, http://www.coned.com/partnerships/news_highlights.html (visited Jan. 30, 2003) 15

Cytryn, Miriam, *Comment: Defining the Specter of Corruption: Austin v. Michigan State Chamber of Commerce*, 57 Brooklyn L. Rev. 903 (1991) 7, 10

Dallas, Lynne L., *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363 (2002) 23

Emord, Jonathan W., *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (Sept. 23, 1991) (http://www.cato.org/pubs/pas/pa-161.html) (visited Jan. 30, 2003) 12

TABLE OF AUTHORITIES—Continued

Page

Fisch, Jill E. *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587 (1991) 8

FPPC, Annual Report 2001 (http://www.fppc.ca.gov/pdf/-2001AnnualReport.pdf) (visited Jan. 30, 2003) 10

Geddis, Andrew C., *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 Tul. J. Int'l & Comp. L. 5 (2001) 17

Hall, Adam P., *Note, Regulating Corporate "Speech" in Public Elections*, 39 Case W. Res. 1313 (1989) 22

Joo, Thomas W., *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1 (2001) 5, 14

Karlan, Pamela S., *Politics by Other Means*, 85 Va. L. Rev. 1697 (1999) 16

Lacayo, Richard, Birnbaum, Jeffrey H., & Faltermayer, Washington and Charlotte, *Rich Man's Game; Forbes Shows the Power of Money in Politics. Should we Change the Rules?*, Time Magazine, Jan. 29, 1996, at 28 9

Levin, Ronald M., *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171 (2001) ... 9-10

Lowenstein, Daniel H., *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505 (1982) 11

TABLE OF AUTHORITIES—Continued

Page

Lowenstein, Daniel H., *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784 (1985) 6-7

Millon, David, *The Sherman Act and the Balance of Power*, 61 So. Cal. L. Rev. 1219 (1988) 15

Nagle, John Copeland, *Corruption, Pollution, and Politics*, 110 Yale L. J. 293 (2000) 18

Rainforest Action Network, *Press Release: Celebrity-Endorsed Ad in Today's New York Times Condemns Boise Cascade's Destructive Logging, Free Speech Attacks* (Sept. 7, 2001) (http://www.ran.org/news/newsitem.php?id=422) (visited Jan. 29, 2003) 17

Redish, Martin H., *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783 (2001) 7-8

Redish, Martin H. & Wasserman, Howard M., *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235 (1998) 11, 15-16, 19

Reuters, *100 Celebrities Sign Letter Opposing War in Iraq* (Dec. 9, 2002) (http://www.abcnews.go.com/wire/US/reuters20021209_532.html) (visited Jan. 29, 2003) ... 17

Ribstein, Larry E., *Corporate Political Speech*, 49 Wash & Lee L. Rev. 109 (1992) 23

Schultz, David, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Laws*, 18 Rev. Litig. 85 (1999) 6

TABLE OF AUTHORITIES—Continued

Page

Shockley, John S., *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377 (1985) 11

Sitkoff, Robert H., *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103 (2002) 19, 22-23

Strasburg, Jenny, *Ban on Israeli Goods Has Shoppers in Uproar: Some Demand Rainbow Co-op End Boycott*, San Francisco Chronicle, Dec. 5, 2002, at B-1 20

Wald, Patricia M., *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753 (1988) 24

Ward, Donald J., *Celebrities Endorse Gore at Gas Works Rally*, The Daily (U. Wash.) (Oct. 30, 2000) (http://archives.thedaily.washington.edu/2000/103000/news.html) (visited Jan. 29, 2003) 17

West, Diana, *Sheryl Crow*, Washington Times (Jan. 24, 2003) 17

Winkler, Adam, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133 (1998) 20-21, 22

Winkler, Adam, *Election Law as its Own Field of Study: the Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243 (1999) 12

Wright, R. George, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 Tenn. L. Rev. 335 (2001) 13

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) was founded 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. PLF is an advocate for limited government, individual rights, and free enterprise.[1]

PLF has litigated on behalf of First Amendment speech rights in the contexts of campaign speech, corporate speech, and expressive associations. *See, e.g., Nike v. Kasky*, Supreme Court Docket No. 02-575; *Board of Regents, University of Wisconsin v. Southworth*, 529 U.S. 217 (2000); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998); *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); *Keller v. State Bar of California*, 496 U.S. 1 (1990); and *First National Bank v. Bellotti*, 435 U.S. 765 (1978)).

PLF believes that the First Amendment prohibits government regulation of speech–be it political or commercial, by individuals, associations, or corporations–unless the regulation satisfies strict scrutiny. Critical to the strict scrutiny analysis is identification of the compelling state interest, which PLF believes should be limited to actual evidence of individual corruption. Moreover, PLF believes that corporate speech adds

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

value to our democratic society and should not be treated as a malignancy that the body politic rejects.

STATEMENT OF THE CASE

In 1986, this Court held that not-for-profit ideological corporations posed no threat of corruption to the electoral system. Therefore, they must be exempted from a federal corporate independent expenditure ban. *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) (*MCFL*). To qualify for this *MCFL* exemption, corporations must: (1) promote political ideas and not engage in business activities; (2) not have shareholders or other persons with a claim on their assets or earnings; and (3) not be established by for-profit corporations or labor unions, and refuse contributions from those entities. *Id.* at 263-64.

The plaintiffs in this case, the not-for-profit advocacy organization North Carolina Right to Life, Inc. (NCRL) and its officers, argued that the FEC-enforced ban on corporate contributions violated their First Amendment right to free speech. The Fourth Circuit held that the *MCFL* rationale for declaring the ban on expenditures unconstitutional applied with equal force to contributions to candidates. Petitioner's Appendix (Pet. App.) 25a. The court held that because not-for-profit ideological corporations pose no corruption threat, then nothing justified prohibiting them from also making contributions. *Id.* Requiring them to do so through political action committees (PACs) was not a viable option because the paperwork and reporting requirements "could effectively cripple small, nonprofit advocacy groups that may have few or no ties to the world inhabited by for-profit corporations." Pet. App. 28a. The court concluded that any "congressional interest in minimizing corruption" was adequately addressed by the $1,000 limitation on contributions to a candidate. *Id.* The court below declined to find Section 441b facially unconstitutional, limiting its ruling only to the ban as applied to NCRL. Pet.

App. 30a-32a. The Federal Election Commission (FEC) petitioned for a writ of certiorari, which was granted.

SUMMARY OF ARGUMENT

The intersection of this Court's jurisprudence regarding the regulation of political speech during election campaigns and its jurisprudence reflecting wariness of corporate participants in the market of ideas has created an untenable situation in which First Amendment rights are based on fine distinctions applied on an almost ad hoc basis.

There are distinctions between contributions and expenditures (*Buckley v. Valeo*, 424 U.S. 1 (1976)); between contributions to candidates and to ballot propositions (*Bellotti*); between individuals and corporations *Federal Election Comm'n v. National Right to Work Committee*, 459 U.S. 197 (1982) (*NRWC*)); between business interests and "advocacy groups" (*MCFL*); and between small advocacy groups and large ones (*Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990)). In the 26 years since *Buckley*, the distinctions have grown more numerous and more fine. The parsing and hairsplitting has rendered this area of the law a patchwork of contradictory opinions impacting political speech rights at the core of the First Amendment. Relatively early on, Justice White noted that *Buckley*'s distinction between contributions and independent expenditures had caused the Federal Election Campaign Act's regulations to become a "nonsensical, loopholeridden patchwork." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 518 (1985) (*NCPAC*). This situation has only grown worse.

In this case, the court below distinguished NCRL as a small not-for-profit issue-oriented corporation to hold that it poses no threat of corruption to the political process and therefore may exercise its First Amendment right to contribute money to a political candidate who shares its views on matters of critical public interest. PLF believes that the court below

correctly decided the matter before it and urges this Court to affirm that decision. Moreover, PLF urges this Court to reconsider the jurisprudence that requires courts to resort to the type of distinctions present in this case. A decision that reduces the need for the seemingly endless parade of distinctions would restore much needed clarity and certainty to the law. To this end, PLF urges the court to (1) restore "actual quid pro quo" corruption as the sole justification for restricting political speech rights, and (2) acknowledge the value of corporate participation in public debates, including debates during the course of elections.

ARGUMENT

I

RESTRICTIONS ON CORE POLITICAL SPEECH MAY BE JUSTIFIED ONLY BY ACTUAL EVIDENCE OF *QUID PRO QUO* CORRUPTION

This Court has held that "contribution . . . limitations operate in an area of the most fundamental First Amendment activities," and such limitations "impinge on protected associational freedoms." *Buckley*, 424 U.S. at 14, 22. Therefore, burdens on contributions may be sustained only if the State demonstrates "a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25; *see also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 387-88 (2000) (affirming standard of review articulated in *Buckley* in assessing the validity of a Missouri state law imposing a limit on political contributions). *Buckley* held that "the prevention of corruption and the appearance of corruption" is a "constitutionally sufficient justification" for a limit on contributions. *Buckley*, 424 U.S. at 25-27; *see also NCPAC*, 470 U.S. at 496-97.

This Court usually defers to Congress's judgment that corporate political speech is of a type more prone to actual corruption and the appearance of corruption, thus justifying

greater regulation than it would countenance for individuals. *See, e.g., NRWC*, 459 U.S. at 210; *NCPAC*, 470 U.S. at 497. The Fourth Circuit declined to apply such deference when the facts–and the fundamental speech rights involved–demanded closer scrutiny. Pet. App. 24a. The court below acted properly, came to the correct result, and this Court could simply adopt the reasoning of the Fourth Circuit to affirm. Lower courts would be better served, however, if this Court went further to cut through the morass of often-contradictory case law attempting to define the type of "corruption" that is necessary to justify regulation of campaign contributions.

In the aftermath of Watergate, the Court was concerned about corruption, election law abuses, and the public's subsequent loss of faith in government. *Buckley*, 424 U.S. at 27 n.28. The *Buckley* Court presumed that political contributions can cause corruption or a public perception of corruption, even though no evidence to that effect had been adduced. *See* Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 Wash. U. L.Q. 1, 18 and n.84 (2001) (*Incorporating Corporate Governance*).[2] This

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[2] The Supreme Court's distinctions between contributions or expenditures based on the amount of corruption each was supposed to engender was controversial from inception. In *Buckley*, Chief Justice Burger stated that "contributions and expenditures are two sides of the same First Amendment coin," 424 U.S. at 241 (Burger, C.J. concurring and dissenting), because both types of political disbursements had sufficient communicative content to require that laws infringing on either be struck down. *Id.* at 244. Justice Blackmun also dissented in *Buckley* on this point, finding no "principled constitutional distinction between the contribution limitations . . . and the expenditure limitations." *Id.* at 290 (Blackmun, J., concurring and dissenting). The distinction remained controversial in the post-*Buckley* cases, and was summed up by Justice Thomas in *Colorado Republican Federal Campaign*

(continued...)

presumption allowed the Court to elude questions as to the amount and kind of evidence required to support an allegation of corruption or the appearance of corruption. *See* David Schultz, *Proving Political Corruption: Documenting the Evidence Required to Sustain Campaign Finance Laws*, 18 Rev. Litig. 85, 98-99 (1999). Although this stance left the lower courts to struggle with the question of evidence, this Court declined to clarify the point in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377. Acknowledging that *Buckley* lacked "precision," *id.* at 386, the Court nonetheless found that *Nixon* "does not present a close call requiring further definition." *Id.* at 393.

The malleability of the concept of "corruption" resulted in a much more expansive definition in *Austin*, 494 U.S. 652. In that case, "corruption" was supplanted by the even more loosely defined phrase, "corrosive and distorting effects." *Id.* at 660. This latter definition expanded the compelling state interest well beyond the *quid pro quo* interest identified only 16 years before. Under *Austin*'s definition of corruption, courts cannot easily discern whether regulation is an intended attempt to purge corruption from politics (permissible) or whether the regulation is an attempt to equalize influence (impermissible). *See* Daniel H. Lowenstein, *Political Bribery and the Intermediate Theory of Politics*, 32 UCLA L. Rev. 784, 851

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[2](...continued)
Committee v. FEC, 518 U.S. 604, 640 (1996) (Thomas, J., concurring and dissenting):

> The protections of the First Amendment do not depend upon so fine a line as that between spending money to support a candidate or group and giving money to the candidate or group to spend for the same purpose. In principle, people and groups give money to candidates and other groups for the same reason that they spend money in support of those candidates and groups: because they share social, economic, and political beliefs and seek to have those beliefs affect governmental policy.

(1985) (describing corruption as "an 'essentially contested concept,' that is, a concept containing a descriptive core on which users of the concept can agree roughly, but so unbounded and so intertwined with controversial normative ideas that general agreement on the features of the concept is impossible"). Once corruption is perceived beyond the relationship between the contributor and the candidate, the entire electoral process is implicated. "Within this enlarged framework, legislative intent may more easily expand from the eradication of a particular evil, to the eradication of a larger class of evils, and even to the effectuation of some model of a greater good." Miriam Cytryn, *Comment: Defining the Specter of Corruption: Austin v. Michigan State Chamber of Commerce*, 57 Brooklyn L. Rev. 903, 936-37 (1991) (*Defining the Specter*). Under the *Austin* standard, questions of evidence largely disappeared. After all, if public opinion polls suggest a significant agreement with the premise that "special interest groups" or "corporate" money has a corrosive impact on the political process, then the government can freely regulate speech rights.[3] This does a disservice to the Constitution.

> [I]n no other case of speech regulation has the Court been willing to accept evidence of public perception of a compelling interest, rather than existence of the interest itself, to justify restrictions on expression. To pander to public perceptions, regardless of their accuracy, is to paternalistically resign oneself to the public's ignorance.

Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. Pa. J. Const. L. 783, 815

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[3] Public opinion polls have achieved some legitimacy as a benchmark of constitutional validity. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 2249 n.21 (2002) (reliance on polling data as evidence of a widespread consensus among Americans that executing the mentally retarded is wrong).

(2001); *see also* Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 Wm. & Mary L. Rev. 587, 589, 617-29 (1991) (arguing that *Austin* is an unjustified departure from precedent because it redefines corruption as unfairness instead of the appearance or actuality of bribery and this redefinition seems to justify legislative efforts to equalize speech by restricting the voices of certain speakers).

The problem reached its apex in *Nixon*, 528 U.S. at 394-95. There, this Court accepted as proof of corruption or its appearance documentation that would not even meet the basic rules of admissibility in a federal trial court. One piece of evidence was a single affidavit from a state legislator who averred that large contributions posed a serious threat to officeholder integrity. *Id.* at 393.[4] The Court also based its decision on a series of newspaper articles reporting on scandals involving elected officials. *Id.*[5] This was a markedly different

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[4] *See, e.g., Murray v. City of Sapulpa*, 45 F.3d 1417, 1422 (10th Cir. 1995) (court will not consider "conclusory and self-serving affidavits"); *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir.), *cert. denied*, 528 U.S. 986 (1999) ([S]tatements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory do not meet this requirement [for admissibility]."). *Cf. First National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968) (The evidence presented on summary judgment cannot consist of conclusory allegations or legal conclusions.).

[5] *Cf. Horta v. Sullivan*, 4 F.3d 2 (1st Cir. 1993) (newspaper account that Mr. Doe lied in his testimony before a Senate Committee is not admissible in a perjury prosecution of Mr. Doe); *May v. Cooperman*, 780 F.2d 240, 263 (3d Cir. 1985):

> newspaper reports are of dubious validity. On the basis of the record, we do not know *anything* about the reliability of the articles; perception, memory, narration, and misrepresentation all

(continued...)

approach than the Court had taken in *NCPAC*, 470 U.S. at 499-500, holding that newspaper articles and public opinion polls were insufficient to challenge groups making independent expenditures advocating the election of a President.

Professor Ronald Levin identifies at least three problems with the Court's reliance on public perceptions of corruption rather than evidence of actual corruption: First, it "invites regulation on too indiscriminate a basis." Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 177 (2001) (*Fighting the Appearance*). In rough-and-tumble politics, accusations of wrongdoing are flung at any and all candidates. All fundraising efforts result in accusations that the candidates are beholden to special interests.[6]

> We have to strike a balance between the restrictions we need to keep the system honest and the latitude

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[5](...continued)

> present potential problems. The reporters may have been present for only part of the hearings they reported, and may not correctly have remembered or interpreted the speeches they heard. They may have simply recorded their impressions of the hearings, in which case the clippings would provide only very slender evidence of legislative intent. We have no idea of the amount of editorializing that went into the articles, which could have been written from a biased point of view. It is not unknown for reporters to stretch some facts or omit others in order to arouse public indignation.

[6] Even the candidacy of multimillionaire Steve Forbes was not exempt from this charge. Commenting on Forbes' $1,000 a plate fund raising event, Charles Lewis, author of The Buying of the President, said: "Forbes is a millionaire who says he's not beholden to special interests who is now beholden to special interests." Richard Lacayo, Jeffrey H. Birnbaum, and Washington and Charlotte Faltermayer, *Rich Man's Game; Forbes Shows the Power of Money in Politics. Should we Change the Rules?*, Time Magazine, Jan. 29, 1996, at 28.

> we need if political discussion is to go forward. So, if we want to regulate any particular aspect of the system, we should ask whether it is a point in the system where restriction will do the most good and the least harm. The knowledge that a particular type of fund-raising has been drawn into question in an editorial or an advocacy group's press releases is not a reliable guide to deciding whether it should be suppressed.

Id. This shift in focus allows legislators a stronger hand in election regulation, as they need only point to a disproportionate impact and identify the source to justify content based regulation. Cytryn, *Defining the Specter of Corruption*, *supra* at 949-50. Second, reliance on public perceptions means that advocates of "reform" can make wide-ranging accusations of corruption, and then rely on the fact that some people believe the charges as a reason to justify regulation. Levin, *Fighting the Appearance*, *supra* at 178. Third, if perceptions of corruption suffice to impose greater regulation, the "reformers" will then simply have more occasions for accusations of noncompliance. The readiness of the campaign finance watchdogs to cry "corruption!" means that candidates and their campaign staff members who make judgment calls on debatable issues will be under a microscopic scrutiny; this is an untenable situation in real life. *Id.*[7] This Court should require evidence of actual *quid pro quo* corruption to justify infringement on core political First Amendment rights, rather than permit reliance on "gossip and newspaper citations." Robert F. Bauer,

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[7] California's Fair Political Practices Commission (FPPC) reports that it opened 770 enforcement actions in 2001 alone. FPPC, Annual Report 2001 at 7 (http://www.fppc.ca.gov/pdf/-2001AnnualReport.pdf) (visited Jan. 30, 2003). Moreover, the Commission contacted more than 800 campaign committees alleging possible violations; only 77 were found to have actually violated the law. *Id.* at 12.

Going Nowhere, Slowly: The Long Struggle Over Campaign Finance Reform and Some Attempts at Explanation and Alternatives, 51 Cath. U.L. Rev. 741, 758 (2002).

Moreover, there is no evidence that corporations–as a identifiable group–are corrupt or introduce corruption into the political process, at least to any greater degree than individuals.[8] Despite research intended to demonstrate that corporations exert considerable influence in ballot campaigns, *see, e.g.*, Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. Rev. 505, 542-47 (1982); John S. Shockley, *Direct Democracy, Campaign Finance, and the Courts: Can Corruption, Undue Influence, and Declining Voter Confidence Be Found?*, 39 U. Miami L. Rev. 377, 391-406 (1985), the many and varied intangibles influencing any election make it extremely difficult to identify a specific causal relationship between contributions and electoral or legislative events. "How can one prove that voters were

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[8] The Court should be careful to distinguish corruption from legitimately effective and persuasive speech.

> To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Bellotti, 435 U.S. at 790 (quoting *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)). Even so, corporate contributions cannot guarantee legislation favorable to business interests. The social welfare programs of the New Deal and Great Society, and the current expanding federal regulation of the tobacco and drug industries, were enacted over the objections of corporate America. Martin H. Redish & Howard M. Wasserman, *What's Good for General Motors: Corporate Speech and the Theory of Free Expression*, 66 Geo. Wash. L. Rev. 235, 247 (1998) (*General Motors*).

overwhelmed by spending, rather than convinced by substantive arguments, other initiative backers, or the inept advertisements for the other side?" Adam Winkler, *Election Law as its Own Field of Study: the Corporation in Election Law*, 32 Loy. L.A. L. Rev. 1243, 1248 (1999). The Court should move away from the amorphous standard of "potential corruption" alleged without evidence and demand an evidentiary showing of actual corruption before permitting the government to silence political speech.

II

CORPORATE SPEECH ADDS VALUE TO A DEMOCRATIC SOCIETY

> The First Amendment is first and foremost a denial of government power. It is not a catalogue of favored and disfavored forms of speech. It is by no means a vehicle for rendering a prejudice against profit-motivated speech the supreme law of the land. It leaves to each of us the choice of what and how to communicate and whether to communicate at all. There exists no lawful "preferred" mix of ideas, no required speech or disallowed speech. No free speech and press model is mandated by the First Amendment. Rather, each model is descriptive of that government-free environment mandated by the First Amendment.

Jonathan W. Emord, *Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence*, Cato Policy Analysis No. 161 (Sept. 23, 1991) (http://www.cato.org/pubs/pas/pa-161.html) (visited Jan. 30, 2003). Expressive associations have a long-standing, constitutionally protected role as part of the political process. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981). Corporations are one form of expressive association. *See, e.g., Pacific Gas & Electric Co. v. Public Utilities*

Comm'n, 475 U.S. 1, 8 (1986) (plurality opinion) ("Corporations . . . contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster."). The Court acknowledges this for media corporations, *Austin*, 494 U.S. at 667, but then makes an inappropriate content-based distinction to give other types of corporations lesser protection. *Id.* Corporations are not an alien force requiring a barrier to protect the political process from its influence. The open political process of a democratic society is the clash of all sorts of different viewpoints, many driven by economic interests and many driven by noneconomic interests. To allow entrenched politicians to pick and choose which among the disparate interests will be hobbled is antidemocratic. The fact that private associations have been a dynamic and sometimes positive influence on politics over our nation's history does not mean that modern economic organizations are not. *See Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983) ("Freedom of speech is not good government because it is in the First Amendment; it is in the First Amendment because it is good government.").

Free speech adds three types of value to society: First, free speech bolsters the pursuit of truth. Second, free speech provides a check on other sources of power, thus supporting a stable, progressive, uncorrupt, and responsive democratic government. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("A major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). Third, free speech serves values of self-realization, personal and cultural development, autonomy, and autonomous decision-making. R. George Wright, *Why Free Speech Cases Are as Hard (And as Easy) as They Are*, 68 Tenn. L. Rev. 335, 337-38 (2001). Accordingly, the First Amendment guarantees that citizens may speak, publish, and join together in groups to engage in political activity to try to achieve the substantive ends they deem

desirable. Lillian R. BeVier, *Campaign Finance "Reform" Proposals: A First Amendment Analysis*, Cato Policy Analysis No. 282 (Sept. 4, 1997) (citing *NAACP v. Button*, 371 U.S. 415 (1963), and *NAACP v. Alabama*, 357 U.S. 449 (1958)). They may attempt to persuade others and to acquire political influence, and the government may not interfere with, punish, repress, or otherwise impede their efforts. *Id.* (citing *Hague v. CIO*, 307 U.S. 496 (1939)).

In *Austin* and *MCFL*, the Court suggested that election-related spending by business corporations is somehow less deserving of protection than speech by individuals or political organizations, *Austin*, 494 U.S. at 659-60; *MCFL*, 479 U.S. at 257, but this premise is inconsistent with the earlier ruling in *Buckley* in two ways: First, by justifying regulation with the lack of public support for corporate views, the Court contradicted the central and longstanding *Buckley* rule against the equalization of relative voices, *Austin*, 494 U.S. at 659, even while purporting to leave it in place. *Id.* at 659-60. Second, *Austin* relied on the grant theory (that a corporation is nothing more than an artifice granted certain benefits by the state) in basing its ruling on the special privileges of corporations. *Id.* at 659. This reasoning is not only conclusory, but also raises a troubling implication that incorporation is predicated on unconstitutional conditions. Joo, *Incorporating Corporate Governance*, *supra* at 80; *see also Pickering v. Board of Education*, 391 U.S. 563, 574-75 (1968) (public school teacher's employment cannot be conditioned on refraining to engage in otherwise constitutional speech).

Corporations add to societal values in numerous ways. Corporations can also give money to organizations having no relation to their business. There is a spectrum of causes for the public good to which corporations contribute with little or no unique self- or class-interest. They are significant underwriters of charitable and cultural activities. For example, Consolidated Edison in New York supports a diverse assortment of

charitable, public health, environmental, and cultural organizations: American Museum of Natural History; American Red Cross; Arts & Business Council; Brooklyn Philharmonic; Channel Thirteen; Cooper Union; Fresh Air Fund; Manhattan College; New York Blood Center; New York Botanical Garden; New York Hall of Science; New York Public Library; Queens Theatre in the Park; United Way; Wildlife Conservation Society; and the YMCA. *See* Consolidated Edison website, http://www.coned.com/partnerships/news_highlights.html (visited Jan. 30, 2003).

Moreover, corporations play an important role in diffusing and checking societal and governmental accumulations of power. David Millon, *The Sherman Act and the Balance of Power*, 61 So. Cal. L. Rev. 1219, 1243 (1988) ("Commercial opportunity meant more than just personal independence. Equally important, it guaranteed a balance of economic power in society."). For example, the Pharmaceutical Research and Manufacturers Association (PhRMA) provides expert testimony before Congress and the Food and Drug Administration relating to pending legislation that impacts the availability and cost of pharmaceuticals. *See generally* www.phrma.org (press releases describing testimony and comments to agencies). Viewed in this light, governmental suppression of corporate speech takes on

> potentially ominous implications for avoiding political power's centralization. One can never be sure whether restrictions on corporate expression are in reality nothing more than governmental attempts to curb or intimidate a potential rival for societal authority. Hence, excluding corporate speech from the First Amendment's reach would almost inevitably have a detrimental impact on the most

> _fundamental values underlying the protection of free speech.

Redish, *General Motors*, *supra* at 264.

A message's overall nature may change when the messenger changes; similarly, the degree of effectiveness and credibility may change depending on the source. *See Bellotti*, 435 U.S. at 791-92 (stating that the people in a democracy "may consider . . . the source and credibility of the advocate"); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 Sup. Ct. Rev. 57, 65 ("Many listeners find that the identity of the source affects the worth or at least their evaluation of the speech."). The same statement from different speakers may constitute a different message. As the Court has noted, an "espousal of socialism may carry different implications when displayed on the grounds of a stately mansion than when pasted on a factory wall or on an ambulatory sandwich board." *City of Ladue v. Gilleo*, 512 U.S. 43, 56-57 (1994); Redish, *General Motors*, *supra* at 257. Corporate speech thus provides both a message and a messenger of value to the bustling market of ideas.

A. Economic Wealth Is Not a Reason to Deny Free Speech Protection

Attempting to regulate corporate participation out of the public debate reflects a profound, patronizing distrust of the American people. Reformers argue that "political competition will not be as free and robust as it should be . . . because irrelevant (or even pernicious) victories in the economic marketplace will squelch the ability of nonaffluent individuals or groups to participate effectively." Pamela S. Karlan, *Politics by Other Means,* 85 Va. L. Rev. 1697, 1702 (1999). However, this argument is inconsistent with First Amendment values on several levels. First, wealth certainly amplifies speech, but corporations are far from the only speakers that can accumulate wealth. For example, wealthy celebrities frequently speak out

on political matters.[9] They can afford to purchase full-page advertisements in the New York Times[10] or other national publications to promote their views. Celebrities also endorse candidates. *See e.g.*, Donald J. Ward, *Celebrities Endorse Gore at Gas Works Rally*, The Daily (U. Wash.) (Oct. 30, 2000) (http://archives.thedaily.washington.edu/2000/103000/news.html) (visited Jan. 29, 2003) (noting appearances by Martin Sheen, Alfre Woodard, Rob Reiner and Christine Lahti). While some may question their expertise, no one doubts that the First Amendment forbids the government from interfering with their right to express political opinions in this way.

Other repositories of wealth abound. Individuals grow rich from various enterprises and use their wealth to promote certain views of the public welfare. *See* Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 Tul. J. Int'l & Comp. L. 5, 61-62 (2001). This may include taking sides during an election. Indeed, it may include *standing* for election, as in the cases of successful candidates Jon Corzine (Senate) and Michael Bloomberg (mayor of New York City) or unsuccessful presidential aspirants Steve Forbes and Ross Perot. In some cases, it is difficult to separate the interests of the owners of a

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[9] Singer Sheryl Crow, actress Susan Sarandon, and others made the news recently for their outspoken opposition to war in Iraq. *See, e.g.*, Diana West, *Sheryl Crow*, Washington Times (Jan. 24, 2003); Reuters, *100 Celebrities Sign Letter Opposing War in Iraq* (Dec. 9, 2002) (http://www.abcnews.go.com/wire/US/reuters20021209_532.html) (visited Jan. 29, 2003).

[10] *See, e.g.*, Rainforest Action Network, *Press Release: Celebrity -Endorsed Ad in Today's New York Times Condemns Boise Cascade's Destructive Logging, Free Speech Attacks* (Sept. 7, 2001) (http://www.ran.org/news/newsitem.php?id=422) (visited Jan. 29, 2003).

company from the company itself. For example, Bill Gates is inextricably linked with Microsoft and one might reasonably presume that what benefits Microsoft benefits Bill Gates. *See* John Copeland Nagle, *Corruption, Pollution, and Politics*, 110 Yale L. J. 293, 305 (2000) (Microsoft contributed $798,163 in soft money and Bill Gates contributed $1,000 per candidate in 1999.). Ben Cohen and Jerry Greenfield are known by their politically-oriented ice cream business and benefit from the self-realization function of free speech whether their names on the check include Cohen and Greenfield, or simply "Ben and Jerry's."[11]

Even when the names of business owners are unknown, their wealth derived from corporate success makes possible their own political speech. For example, according to the Center for Responsive Politics, the top individual contributor to 2002 campaigns was Haim Saban who gave over $9 million to Democratic candidates. Center for Responsive Politics, *Election Overview, 2002 Cycle, Top Individual Contributors* (http://www.opensecrets.org/overview/topindivs.asp?cycle=2002) (visited Jan. 24, 2003). Meanwhile, the top overall donor was Saban Entertainment, which gave almost $11 million to Democrats. Center for Responsive Politics, *Election Overview, 2002 Cycle, Top Overall Donors* (http://www.opensecrets.org/overview/topcontribs.asp?cycle=2002) (visited Jan. 24, 2003). One might reasonably suppose that what Haim Saban believes benefits his company (and the company's shareholders) also benefits himself personally. Finally, wealth is not a reliable indicator of a particular point of view. Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable*

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[11] Although acquired by Unilever in 2001, Ben and Jerry's remains committed to a variety of social causes, including global warming and overseas labor conditions. Ben and Jerry's Social Performance Audit 2001, Social Auditor's Letter to Stakeholders of Ben and Jerry's (http://www.benjerry.com/socialmission/01socialaudit/letter01.html) (visited Jan. 30, 2003).

Dilemmas, 94 Colum. L. Rev. 1258, 1269 (1994). Ted Turner and Barbra Streisand on the Left are countered by Rupert Murdoch and Charlton Heston on the Right.

> Egalitarianism is not a good reason for curtailing corporate political speech but not the political speech of wealthy individuals or other unincorporated business entities. Indeed, discriminating against corporate political speech might be anti-egalitarian, because it would take away from individuals the ability to organize in a form that would allow them to engage efficiently in collective action.

Robert H. Sitkoff, *Corporate Political Speech, Political Extortion, and the Competition for Corporate Charters*, 69 U. Chi. L. Rev. 1103, 1110-11 (2002) (*Corporate Political Speech*).

B. Self-Interest Is Not a Reason to Deny First Amendment Protection

Most, if not all, speakers have some self-interest, whether financial or personal, in having their views accepted by their audience. This self-interest does not diminish the First Amendment protection sheltering "political candidates seeking elective office, consumer organizations seeking increased consumer protection, welfare recipients seeking increases in benefits, farmers seeking subsidies, and American auto workers seeking higher tariffs on foreign automobiles." Redish, *General Motors*, *supra* at 269-70. Instead, First Amendment values of truth-seeking and democratic participation are advanced when the substance of the debate contains elements from all interested parties. The simple fact that all sides of a debate can participate is "likely to spur expression's thoroughness, thoughtfulness, and breadth of distribution. To exclude all self-interested expression from the scope of the constitutional guarantee, then, would effectively gut free speech protection." *Id.*

Despite "reformer's" concerns that people must be protected from self-interested corporate speech, it would seem that the people are not only quite capable of looking out for their own interests, but are also capable of organizing counter-speech to corporate communications. Frequently, this takes the form of boycotts. *See, e.g.*, CNN, *Environmental Campaigners Take Aim at Oil Companies* (May 30, 2002) (http://www.cnn.com/2002/WORLD/europe-/05/30/oil.environment.groups.glb/index.html) (visited Jan. 29, 2003) (Greenpeace, Friends of the Earth, People and Planet, and the World Wildlife Fund urge boycott of Exxon and other oil companies, specifically identifying their action as a response to corporate political contributions); Jenny Strasburg, *Ban on Israeli Goods Has Shoppers in Uproar: Some Demand Rainbow Co-op End Boycott*, San Francisco Chronicle, Dec. 5, 2002, at B-1 (grocery store's boycott of Israeli products led to counter-boycott by local Jewish community). Boycotting is such a popular response to corporate speech that an organization called "Boycott Watch" was established in 2000 to keep track of all the major boycott actions. *See* www.boycottwatch.org. Thus, those who hear corporate speech have demonstrated their ability to consider the source as a factor in calculating the worth of the speech.

C. "Disincentives to Disassociate" Are Not a Reason to Deny First Amendment Protection

Corporations derive their wealth in two ways: from customers purchasing the corporate product, and from shareholder investments. Customers who disagree with the political leanings of corporate speech can simply refuse to purchase the companies' products. The Court's concerns about speaking with "someone else's money" is logically related only to corporate wealth derived from shareholders. "Customer money . . . is not accumulated with the help of the corporate form. Customers of a business often do not know whether they are dealing with corporation, partnership, or sole proprietorship.

Indeed, the business association's form is irrelevant to its ability to attract customers and sell services or products." Adam Winkler, *Beyond Bellotti*, 32 Loy. L.A. L. Rev. 133, 158 (1998). The impact of corporate speech on minority shareholders raises additional questions. This Court has shown a varying amount of deference to the notion that shareholders need protection from corporate expressive activity in the political realm. In *Bellotti*, the Court placed little weight on this interest in restricting corporate political spending to protect shareholders when the shareholders are able to pursue their own remedies within the corporate structure or through derivative shareholder suits. *Bellotti*, 435 U.S. at 794 ("Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."). Yet the desire to protect "members" of a corporation without capital stock was held to justify the regulations of section 441b when those "members" contributed money to the corporation but had no decision-making authority within the corporation. *NRWC*, 459 U.S. at 206-08.[12]

Tacking back the other direction, the Court in *NCPAC* and *MCFL* downplayed the interest in protecting shareholders when the political nature of the corporation itself makes it likely that its members will support the focus of that corporation's political expenditures. *NCPAC*, 470 U.S. at 495 (Contributors to politically oriented organizations "obviously like the message they are hearing from these organizations . . . otherwise they would not part with their money."); *MCFL*, 479 U.S. at 259 ("The resources [MCFL] has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."). Thus, Congress's interest in protecting

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[12] The National Right to Work Committee's solicitations for donations urged potential donors to become "members" of the organization. However, the corporate bylaws specifically disclaimed the existence of "members," and there were no membership meetings or any other functions of "membership." *NRWC*, 459 U.S. at 206.

the members of organizations regulated under section 441b is less compelling when mechanisms other than campaign finance laws (such as the structure of the corporate decision-making process and the dependence of the popularity of the corporation's political views to attract funding) ensure that the political views expressed by a corporation's expenditures will match the views of its members. Adam P. Hall, *Note, Regulating Corporate "Speech" in Public Elections*, 39 Case W. Res. 1313, 1318 (1989).

The Court has worried that shareholders' "disincentives to disassociate" from a for-profit corporation are so overwhelming as to implicate the shareholders' First Amendment rights *not* to associate with expressive activity. *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 234 (1977). However, this fear doesn't make sense as a constitutional principle in the context of corporate stock ownership because it is overbroad.[13] Reinvesting one's holdings in a politically compatible corporation is a difficulty of narrower dimension. Sitkoff, *Corporate Political Speech*, *supra* at 1119 (noting proliferation of "social responsibility" funds, assuring investors that their money will not be invested in corporations engaged in certain

[13] There is another inherent contradiction in the court's concern about shareholders disincentive to disassociate for corporations in general, but the utter lack of such concern for shareholders in media corporations. The past ten years have seen mega-mergers producing powerful media conglomerates that are in the portfolios of many mutual funds, pension plans, and individual shareholders. *See, e.g.*, Winkler, *Beyond Bellotti*, *supra* at 190-91 (noting that media empires include significant holdings in real estate, utilities, advertising companies, manufacturing, telecommunications, financing, transportation, sports franchises, retail enterprises, and a host of other industries and businesses). These media corporations have greater speech rights than other types of corporations, despite the Court's protestations in other contexts that the freedom of the press is no greater than any other individuals' right to free speech. *See Pell v. Procunier*, 417 U.S. 817, 834 (1974).

specific forms of behavior, such as the sale of alcohol or tobacco, military contracting, abortion-related services, and so on). All of life involves trade-offs. This is not like the compelled speech cases, in which the state *mandates* contributions subsequently used for expressive purposes. Corporate treasuries serve the more generalized purpose of maximizing profits, and corporate managers enjoy considerable discretion in determining what furthers the economic interest of the corporation. *See* Lynne L. Dallas, *The New Managerialism and Diversity on Corporate Boards of Directors*, 76 Tul. L. Rev. 1363, 1368-69 (2002).

Moreover, as Prof. Sitkoff explains, the Court's analysis of economic disincentives to disassociate does not comport with reality.

> The minority shareholder who invests in stock for income, which is the precondition to having an economic disincentive to dissociating, is by hypothesis indifferent between companies with comparable rates of return. He therefore has no reason not to sell his stock in the politically active company and then invest the proceeds in another company that is not politically active. In contrast, the minority shareholder or member of the incorporated nonprofit political association often faces an incentive not to dissociate because of the shortage of alternatives. There is a thick market for corporate securities; the menu of prospective political associations is less robust.

Sitkoff, *Corporate Political Speech*, *supra* at 1120 (citing Larry E. Ribstein, *Corporate Political Speech*, 49 Wash & Lee L. Rev. 109, 137 (1992), and Henry N. Butler and Larry E. Ribstein, *The Corporation and the Constitution* 74-75 (AEI 1995) (discussing the difficulties a member of an ideological group faces in exiting, as opposed to the shareholders in a

corporation). *See also International Assoc. of Machinists & Aerospace Workers v. Federal Election Comm'n*, 678 F.2d 1092, 1118 (D.C. Cir.), *aff'd*, 459 U.S. 983 (1982) (shareholder is not legally or practically obliged "to continue his investment, is not compelled to speak in violation of his First Amendment right to remain silent" by a statute permitting corporate political action committees). Therefore, the Court's concerns about "disincentives to disassociate" do not provide a sufficiently compelling reason to deny corporate speech full protection to engage in electoral debates.

CONCLUSION

Upon reviewing the Court's decisions since *Buckley*, Judge Patricia M. Wald presciently questioned whether the rulings "have any real roots in the values enshrined in the first amendment? Do these fine distinctions contribute more to freedom of association or to mass cynicism about how the electoral system works?" Patricia M. Wald, *Two Unsolved Constitutional Problems*, 49 U. Pitt. L. Rev. 753, 757 (1988).

The Court's attempt to graft laws restricting political speech in the name of campaign finance reform has seen our precious free speech rights moving further from the strong trunk at the center of the First Amendment to a precarious balance on the outermost branches and leaves. Currently, the law of campaign finance exists mostly as a series of distinctions in which the First Amendment protection of free speech grows ever more attenuated.

In its decision below, the court rescued a small, not-for-profit advocacy organization from its precarious perch on a small branch and acknowledged that their speech was fully

deserving of the shelter of the First Amendment. At the very least, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

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No. 02-403

In The
Supreme Court of the United States

FEDERAL ELECTION COMMISSION,

Petitioner,

v.

CHRISTINE BEAUMONT, LORETTA THOMPSON, STACY THOMPSON, BARBARA HOLT, NORTH CAROLINA RIGHT TO LIFE, INC.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN TAXPAYERS ALLIANCE

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Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1959) 9

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Other Authorities

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Peter L. Berger & Richard John Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: The Role of Mediating Structure in Public Policy* 36 (1977) 6, 7

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INTEREST OF AMICUS CURIAE[1]

The American Taxpayers Alliance (ATA) is a nationwide, non-profit organization dedicated to government reform through grassroots organization, public education and discussion of issues and is exempt from federal income tax under Internal Revenue Code section 501(c)(4).

The issue at stake in this case is of direct concern to ATA and its donors. ATA does not have an affiliated political action committee, nor does it have members from whom it could solicit under the Federal Election Commission's solicitation rules. Therefore, ATA has a strong interest in expressing the collective voice of its donors through direct contributions to candidates.

SUMMARY OF ARGUMENT

The command of the First Amendment directly engages the non-profit organization's raison d'etre in this case because the non-profit organization's sole or primary function is to aggregate the advocacy voices of its members through communication and expression. Yet, the Government and amici argue that corporate structure, wholly unrelated to the evil sought to be prevented, trumps First Amendment concerns.

For ease of a bright-line test, the Government has imposed a broad prophylactic rule on all corporations,

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1 All parties have consented to the filing of this brief *amicus curiae*, as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No person or entity, other than the *amicus*, its donors, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

whether for-profit or non-profit, and by doing so, has turned a blind eye to the structural, functional and constitutional differences that exist between corporations. These differences are constitutionally significant; there is no compelling or sufficient interest in treating a non-profit corporation akin to a voluntary political association in the identical manner as a for-profit, wealth-amassing corporation.

In light of the great differences between non-profits and for-profits, and in particular, the similarities of § 501(c)(4) corporations to voluntary political associations, corporations of the former sort cannot constitutionally be treated like those of the latter for purposes of the broad prophylactic rule. A corporate contribution ban is unconstitutional as applied to non-profit organizations that meet an *MCFL*-type test.

ARGUMENT

What should not get lost in the background of this case is that, first and foremost, non-profit organizations are groups of individuals that have associated for some social purpose, and are not simply some abstract, soulless commercial corporate entity. It is the rights of these associated individuals which the Constitution ultimately seeks to protect.

It cannot be disputed that associations do good things. Not only do they perform acts of charity; educate; shape and define values, policies, and culture; and lessen the burden of government, they serve to amplify the voices of individuals. Within this role, they are also concentrations of power which can buffer, or stand up to, the power of the

majority, other interest groups, and the state. In short, they are an important part of our democratic structure.[2]

Concern exists today about whether non-profit organizations will be able to continue to play their very important role in our representative democracy. Recent legislative activity, such as the Bipartisan Campaign Reform Act of 2002, severely restricts and burdens the speech of non-profit organizations. And, until the court of appeals found the prophylactic ban at issue here unconstitutional, the advocacy speech of nonprofit organizations in the form of contributions was silenced.

I. The Structural And Functional Differences Among Corporations Are Constitutionally Significant.

While the ban on corporate contributions at issue here treats all corporations the same, the fact is that not all corporations are created equal. Despite sharing corporate form, there remain significant structural and functional differences among corporations.

A. Non-profits advance important purposes which are not served by the private or public sectors.

The Government, in relying upon a broad prophylactic rule, makes no serious effort to consider variations in corporations, how corporations may differ in

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2 For this reason, non-profit associations are often referred to as the "Independent Sector," the "Third Sector," or the "Non-Profit Sector." This sector should be distinguished from the public sector (governmental bodies) and the private sector (proprietary organizations).

form or function, much less how such distinctions are relevant to a First Amendment analysis. Zechariah Chafee, Jr. pointedly observed that "[t]he men who propose suppressions, in Congress and elsewhere, speak much of the dangers against which they are guarding, but they rarely consider the new dangers which they are creating *or the great value of what they are taking away*." Zechariah Chafee, Jr., Does Freedom of Speech Really Tend to Produce Truth?, in THE PRINCIPLES AND PRACTICE OF FREEDOM OF SPEECH 334 (Haig Bosmajian ed., 1971) (emphasis added). The broad prophylactic corporate contribution ban has taken away a part of the unique role nonprofit advocacy groups play in our political life.

In the 1830s, Alexis de Tocqueville marveled at the special role nonprofits play in America's political life:

> As soon as several Americans have conceived a sentiment or an idea that they want to produce before the world, they seek each other out, and when found, they unite. Thenceforth they are no longer isolated individuals, but a power conspicuous from the distance whose actions serve as an example; when it speaks, men listen.
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>
> Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial association in which all take part, but others of a thousand different types – religious, moral, serious, futile, very general

> and very limited, immensely large and very minute. Americans combine to give fetes, found seminaries, build churches, distribute books. . . . [I]f they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Alexis de Tocqueville, 2 Democracy in America 512-13 (J.P. Mayer ed. & George Lawrence trans., Harper Perennial 1966) (1840). Tocqueville's oft quoted description of America's heterogeneous and continuously expanding sector remains pertinent today and highlights the special role non-profits continue to play in our representative democracy.

The expressive association, of which Tocqueville wrote, can be exercised in a number of ways. The simple act of associating can in and of itself be a form of expression. Americans donate money to charities, purchase magazine subscriptions and buy Girl Scout cookies simply to say something. Sometimes, this type of expression is not enough. Americans join clubs, associations and groups to coordinate and amplify their voices with those of others to make their common voice a more effective expression of their views. Unlike the purchase of magazines or cookies, sometimes we associate not just for altruistic means, but to influence public policy and get something done. As Justice Harlan noted, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association . . . ." *NAACP v.*

Alabama, 357 U.S. 449, 460 (1958).

Associations serve another important purpose in American society. As the Court observed in *Dale*, the freedom of association is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). Not only do associations facilitate individual expression, they serve as a bulwark against an ambitious majority. As one scholar noted, associations "are the hedgerows of civil society." Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841, 1853 (2001). Associations are the "critical buffers between the individual and the power of the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618-19 (1984); *see also* Peter L. Berger & Richard John Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: From State to Civil Society*, 145, 148 (Michael Novak ed., 1996) ("[Voluntary associations] stand between the private world of individuals and the large, impersonal structures of modern society. They 'mediate[]' by constituting a vehicle by which personal beliefs and values could be transmitted into the mega-institutions."). Associations are also the "laboratories of innovation" that clear out the civic space needed to "sustain the expression of the rich pluralism of American life." Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. at 1853 (quoting Berger & Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: The Role of Mediating Structure in Public Policy* 36 (1977)); see also *Roberts*, 468 U.S. at 622 (noting that associations are "especially important in preserving political and cultural diversity and in shielding dissident expression

from suppression by the majority."). "Most of the major reforms in American Society . . . have originated in this nonprofit sector." Lester M. Salamon, *America's Nonprofit Sector: A Primer* 9 (1992).

Support of the non-profit sector, which serves all of these important purposes, would seem to be beyond reproach because support of pluralism and diversity is the very hallmark of American representative democracy. "'E Pluribus Unum' is not a zero-sum game . . . . [T]he national purpose indicated by the unum is precisely to sustain the plures," and leads not to "balkanization" but to a stronger unum through the creation of "imaginative accommodations." Berger & Neuhaus, *Peter L. Berger and Richard John Neuhaus Respond, in To Empower People: The Role of Mediating Structure in Public Policy* 41-42 (1977). Yet, the prophylactic rule at issue here, rather than recognizing the non-profit sector's different, yet important, functions, indiscriminately lumps the non-profit sector with the private sector in its complete ban on contributions.

B. Non-profits, although sharing corporate form with for-profits, are otherwise structurally different.

America's non-profit sector is but one segment of a large group of organizations. In 1998, there were 27.7 million organizations (businesses, tax-exempt organizations, and governmental entities) in the United States, of which, 1,626,000 were non-profits (all IRS-designated tax-exempt organizations). The New Nonprofit Almanac IN BRIEF 7 (visited Feb. 7, 2003) http://www.independentsector.org/PDFs/inbrief.pdf. And within the non-profit sector, § 501(c)(3), § 501(c)(4) and

religious congregations comprised 1.2 million organizations, of which 140,000 were § 501(c)(4) organizations. *Id.* Although non-profits comprise only 5.8% of the total number of organizations in the United States, *id.*, they are treated identically to all other corporations for purposes of the contribution ban.

Within the non-profit sector are many types of organizations, whose purposes are various and diverse. Section 501(c) of the Internal Revenue Code lists no more than 25 classifications of nonprofits, s*ee* 26 U.S.C. § 501(c), and nonprofits may also qualify under sections 501(d), (e), and (f), and section 521(a). However, the sine qua non of nonprofits which qualify for tax exempt status under the Code, is the nondistribution constraint, that profit cannot inure to the personal benefits of any of their members. The Code provision under which an organization chooses to seek exemption defines its range of permissible activities and purposes, but the kinds of purposes for which nonprofits form are typically divided into two general categories: "public benefit organizations" and "mutual benefit associations."

"Public benefit organizations" generally are comprised of § 501(c)(3) and § 501(c)(4) organizations. Section 501(c)(4) of the Internal Revenue Code exempts from tax civic organizations and nonprofit organizations "operated exclusively for the promotion of social welfare." I.R.C. § 510(c)(4)(A) (2001). The only statutory restriction in the Internal Revenue Code on the activities of a social welfare organization is a proscription on the use of the net earnings of the organization for the benefit of any private individual. § 501(c)(4)(B).

A social welfare organization satisfies the Treasury Regulation's requirement that it be operated exclusively for the required exempt purpose "if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community." Treas. Reg. § 1.504(c)(4)-1(a)(2)(i) (1990). Organizations whose activities primarily benefit their membership are not eligible for exemption under § 501(c)(4). *See, e.g.*, Rev. Rul. 80-107, 1980-1 C.B. 117 (shareholder organization to promote industry interests is not social welfare organization); Rev. Rul. 77-111, 1977-1 C.B. 144 (organization to stimulate business to remedy economic declines is not charitable because major benefits accrue to the businesses).[3] Nor is any organization operated primarily for the promotion of social welfare if it is carrying on a business with the general public in a manner similar to organizations which are operated for profit. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (1959). Furthermore, the "promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." Treas. Reg. § 1.504(c)(4)-1(a)(2)(ii) (1990). Revenue Ruling 81-95 nonetheless holds that as long as an organization that is exempt from tax under § 501(c)(4) is "primarily engaged in activities [that] promote social welfare," lawful participation in political campaigns is permitted.[4] Rev. Rul. 81-95, 1981-1 C.B. 332. This Ruling

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3 In this respect, a § 501(c)(4) organization, like North Carolina Right to Life, is distinguishable from the Michigan Chamber of Commerce in *Austin*. The Michigan Chamber of Commerce is a § 501(c)(6) organization formed to promote the common good and interests of the Michigan business community, Brief for Appellee at 4, *Austin*, 494 U.S. 652 (1990), and was comprised of approximately 8000 members, seventy-five percent of which were for-profit corporations. Brief for Appellant at 4, 12, *Austin*, 494 U.S. 652.

4 IRS General Counsel Memorandum 38,264 (Jan. 30, 1980) questions

based its conclusion, in part, on legislative history of the enactment of section 527 of the Code, which suggests that § 501(c)(4) organizations may engage in political activities. S. REP. NO. 93-1357, 93d Cong. 2d Sess. 29 (1974), reprinted in 1975-1 C.B. 517, 533. Therefore, a § 501(c)(4) organization may intervene in political campaigns, as long as this activity is not its "primary" activity.[5]

II. The First Amendment Requires Looking Beyond The Corporate Form To Determine Whether A Non-Profit Corporation Is Similar To A Voluntary Political Association And Therefore, Does Not Have The Potential For Unfair Deployment Of Wealth For Political Purposes.

whether under the Federal Election Campaign Act it is lawful for an incorporated non-profit organization to make political contributions. "Illegal activities are the antithesis of activities that promote social welfare. Stated otherwise, the common good and general welfare of the people of a community is the cornerstone of the social welfare concept and illegal activities cannot be said to benefit the community." Gen. Couns. Mem. 38,264 (Jan. 30, 1980).

5 Political activities of organizations exempt under the purpose specific mutual benefit provisions of the Internal Revenue Code, *e.g.* § 501(c)(6) organizations, are not similarly limited under the Code. It is this unrestricted political activity, as well as the mission of providing services primarily or exclusively for a limited membership, that distinguishes nonprofit organizations operating under these sections from social welfare organizations and charities that qualify for tax exempt status under §§ 501(c)(3) and 501(c)(4).

A. *MCFL's* rationale, which does not elevate form over substance, is equally applicable here.

An association must merely engage in expressive activity to be entitled to the protections of the First Amendment. *Dale*, 530 U.S. at 655. As described above, a non-profit organization's activities, by their very nature, lie at the heart of the First Amendment.

The prophylactic ban at issue elevates form over substance. Simply because of an organizational feature wholly unrelated to the evil sought to be corrected, non-profits are prohibited from speaking through direct contributions. Yet the Court in *MCFL* recognized that First Amendment scrutiny cannot focus on form alone, noting that "[r]egulation of corporate political activity . . . has reflected concern not about the use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes." *FEC v. Massachusetts Citizens for Life, Inc.*, (*MCFL*) 479 U.S. 238, 259 (1986). Therefore, the First Amendment requires that this Court go beyond the corporate form and examine non-profits' relevant features to determine whether, irrespective of their corporate form, they have the potential for unfair deployment of wealth for political purposes.

The court of appeals recognized the critical distinction between for-profits and non-profits and used this Court's decision in *MCFL* as its starting point. The court of appeals noted that nonprofits possess "several characteristics . . . that make them special purveyors of political speech," and "[a]s a consequence, nonprofit advocacy organizations play a distinctive role in the political scheme." Pet. App. 6a.

The court provided an illustrative, but certainly not exhaustive, list of the types of vital expressive activities of nonprofit advocacy organizations that "help empower citizens to make informed political choices." Pet. App. 7a. The court of appeals correctly concluded that the rationale of the Court in *MCFL* is equally applicable in this case. Pet. App. 25a. The court stated that it sought "to respect the Supreme Court's basic pronouncement in *MCFL* on the role that nonprofit advocacy groups play in our political life." Pet. App. 26a.

B. Applying *MCFL* factors, it is clear that § 501(c)(4) organizations are like voluntary political associations, and therefore, do not pose any threat of corruption.

For purposes of constitutional scrutiny, one needs to identify and evaluate nonprofits' relevant features, and compare and contrast them to other kinds of corporations. It may be less useful to lump all nonprofits together than to be able to recognize how even nonprofits differ.[6] An examination of the differences among corporations and the similarities between § 501(c)(4) organizations and voluntary political associations demonstrates that a broad prophylactic rule is not justified even under a more lenient level of scrutiny. The Court should find that § 501(c)(4) organizations, by their very structure and purpose, do not per se pose any threat of corruption, or in the alternative, use the features set out in *MCFL* and applied in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

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6 At issue in this case is the ability of a § 501(c)(4) corporation to make direct contributions to candidates. As such, ATA will not specifically address whether a complete contribution ban as applied to other non-profit corporations is unconstitutional.

The *Austin* Court found that the potential for corruption which Michigan sought to eliminate was related to the corporate form itself. That is, the economic advantages of incorporation – limited liability, perpetual life, etc. – provided the potential for abuse of the electoral process. *Austin*, 494 U.S. at 658-60. The underlying basis was that the state granted corporations these advantages to facilitate economic success. Thus, the argument goes, when corporate resources, which are facilitated by state-conferred advantages, are put to political use, it has the potential to distort the political process. Consequently, because all corporations enjoy these advantages, the Court dismissed the Chamber's argument that the Michigan statute was overinclusive because it applied to all corporations, regardless of accumulated wealth or size. *Id.* at 660, 666. Instead, the Court used the features set out in *MCFL* to test whether the Chamber, a § 501(c)(6) corporation posed the threat that the statute sought to eliminate. *Id.* at 661-64.

The First Amendment dictates that restrictions on speech be no more than is necessary to combat the problem being addressed. The prophylactic ban as applied to non-profits is not tailored to meet the Government's interest. Using the features set out in *MCFL* and applied in *Austin*, it is clear that the complete contribution ban goes too far as applied to § 501(c)(4) corporations, which share the features of voluntary political associations.[7]

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7 It has been argued that the *MCFL* test is unpredictable and subject to biased and arbitrary application; therefore, the federal tax code classifications of nonprofit corporations should be used as a means of identifying those nonprofits whose speech may not, as a constitutional matter, be permissibly restricted. *Developments in the Law – Political Activity of Nonprofit Corporations*, 105 Harv. L. Rev. 1656, 1674

The concern that nonprofit corporate organizations have the potential to use the advantages of incorporation to obtain an unfair advantage in the political marketplace is not relevant with respect to § 501(c)(4) organizations. For an organization to qualify under § 501(c)(4), its political activity must not be its primary purpose, *i.e.*, it must be insubstantial. A § 501(c)(4) organization must be engaged in activities that promote social welfare.[8] This requirement reduces the danger that the organization would unfairly dominate the political arena or distort public discourse. *See Austin*, 494 U.S. at 658-59 (quoting *MCFL*, 479 U.S. at 257) (stating that the advantages of corporate status permit corporations to use "'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'"). Furthermore, a § 501(c)(4) organization's political activity must be consistent with its primary purpose, social welfare. These limits placed on a § 501(c)(4) organization's political activities by the tax code neutralize any potential "unfair advantage in the political marketplace" resulting from the organization's corporate form. Furthermore, as shown above, the non-profit sector also operates as a ballast *against* the corporations of the private

(1992). The more successful a non-profit organization is at advocating its members' voices, the more likely that these arbitrary applications will be used by opponents to punish it, leaving only the wealthy, who can sustain legal costs, to compete in the political process.

8 To the extent that a non-profit organization is multi-purpose, that is, providing goods, services or facilities to its members and the general public in addition to advocacy activities, Amicus does not take a position on whether a complete ban on their advocacy and voice through contributions is constitutionally permissible. However, it is clear that regardless of whether the Government is justified in prohibiting speech in the former case, it is not permitted to ban this speech by expressive, ideological, or advocacy associations.

sector.

The argument that nonprofits possess economic power by virtue of their tax exemptions does not justify a complete ban on contributions by nonprofits. Some have argued that the tax exemption serves to compensate nonprofit organizations for the difficulties they face in raising capital. Henry B. Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835, 877 (1980); Henry B. Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 558 n.191 (1981). Many non-profits incorporate because of the shield of limited liability, especially in light of the abrogation of the charitable immunity doctrine in the states. In this respect, an association faces a difficult choice in these litigious times – have the ability to make contributions or incorporate and receive limited liability.

The fear of corruption of the political process by "the corrosive and distorting influence of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas," *Austin*, 494 U.S. at 660, likewise is no concern regarding § 501(c)(4) organizations. First, very few § 501(c)(4) organizations have any great wealth. Second, membership in a § 501(c)(4) organization is voluntary and contributions are given *because* of the non-profit's advocacy voice. No member or donor has an economic stake in the organization and therefore continued association is based on support for the organization's agenda and speech.

In contrast, the *Austin* Court found that members of a § 501(c)(6) organization might choose to remain members,

notwithstanding political differences, merely to enjoy the nonpolitical benefits of membership. *Austin*, 494 U.S. at 663. In this respect, the Court determined that members of the Chamber, a § 501(c)(6) organization, had more in common with shareholders of a business corporation than members of a § 501(c)(4) organization. *Id.*

Although it is possible to require that non-profits have a policy of not accepting contributions from business corporations, as shown above, the tax code requirements imposed on § 501(c)(4) organizations reduce the danger that such organizations will serve as conduits for corporate contributions. Moreover, contribution limits also undercut this justification for a prophylactic ban.

The availability of using a separate segregated fund to speak is not a practical option for all § 501(c)(4) corporations. Many § 501(c)(4) organizations do not have members which meet the definition of members for purposes of the FEC solicitation regulations. It is usually too cumbersome and expensive to have members with voting rights and membership meetings. So, for many § 501(c)(4) organizations, membership is ceremonial or symbolic at best. If there is no membership structure, as is the case with many, if not most, § 501(c)(4) corporations, the organization can only solicit PAC contributions from its officers and executive administrative personnel, which normally would number less than ten individuals.

In sum, mere incorporation does not "present the specter of corruption." *Austin*, 494 U.S. at 711 (Kennedy, J., dissenting) (quoting *MCFL*, 479 U.S. at 263). The substantial differences between non-profits and for-profits constitutionally dictates a differential treatment despite their

mere similarity of corporate form.[9]

III. Our Representative Democracy Depends Upon A Strong Non-Profit Sector And A Broad Prophylactic Ban Hinders The Ability Of Non-Profits To Fully Perform Their Role.

Not only is it constitutionally problematic to treat the private sector and the non-profit sector alike, the strength of our democracy demands that non-profits' speech be encouraged, rather than prohibited. Tocqueville queries, "Is that just an accident, or is there really some necessary connection between associations and equality." Tocqueville, 2 Democracy in America at 514. Tocqueville finds that representative democracy is dependent upon a strong non-profit sector, in part, because of its stabilizing influence:

> Feelings and ideas are renewed, the heart enlarged, and the understanding developed only by the reciprocal action of men one upon another. I have shown how these influences are reduced almost to nothing in democratic countries; they must therefore be artificially created, and only associations can do that.

Id. at 515-16. He concludes,

> Among laws controlling human societies there is one more precise and clear, it seems to me, than all the

9 Although for-profits and non-profits may share the corporate form, the similarity often ends there. Most states have a separate incorporation statute for non-profits.

> others. If men are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads.

Id. at 517. Not only is the prophylactic ban unconstitutional for its failure to recognize the critical distinctions between for-profit and non-profit corporations, the ban hinders the ability of associations to fully contribute to the political debate and thereby foster our democratic system.

Finally, associational activity should be encouraged, rather than prohibited, because it protects citizens from overreaching by the government and its counterpart in the private sector – the large corporation. Lumping the non-profit sector with the private sector removes this balancing or stabilizing influence against overreaching by the other two sectors.

The non-profit sector is at a critical juncture in America. The prohibition at issue here, along with the burdensome restrictions in the Bipartisan Campaign Reform Act, have chipped away at the non-profit sector's important role in our democracy. Because of an organizational feature wholly unrelated to the evil sought to be corrected, the Government has imposed a broad prophylactic rule. Rather than treat the non-profit sector the same as the private sector simply for ease of a bright-line rule, the Court should examine the constitutional differences between the two.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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